Nov 5 — 1871 — Judge Davis —

Submitted —

Reversed — Judge Swayne to write

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 527.

THE NEW ENGLAND MUTUAL INSURANCE COMPANY, THE INDEPENDENT INSURANCE COMPANY, THE REPULIC INSURANCE COMPANY, THE EQUITABLE INSURANCE COMPANY, THE IRON-MOUNTAIN MINING COMPANY, APPELLANTS,

vs.

THE DETROIT AND CLEVELAND STEAM-NAVIGATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED DECEMBER 11, 1871.

It seems to me that Hibbard is right —

Oct Term 1873

SUPREME COURT OF THE UNITED STATES.

No. 527.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 April term, A. D. 1871.

At a stated term of the circuit court of the United States of America within and for the sixth circuit and northern district of Ohio, begun and held at Cleveland, in said district, on the first Tuesday of April, being the fourth day of that month, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States of America the ninety-fifth—present, the Honorable Halmer H. Emmons, circuit judge—among the proceedings then and there had were the following, to wit:

THE NEW ENGLAND MUTUAL INSURANCE COMpany et al.
vs.
THE DETROIT & CLEVELAND STEAM NAVIGAtion Company.
} No. 2248. Appeal in admiralty.

Be it remembered that, heretofore, to wit, on the 18th day of April, A. D. 1871, came the appellants, by their proctors, and filed in the clerk's office of said circuit court their appeal, which is in the words and figures following, to wit:

Appeal.

Circuit court of the United States, northern district of Ohio.

THE NEW ENGLAND MUTUAL INSURANCE COMpany, The Independent Insurance Company, The Republic Insurance Company, The Equitable Insurance Company, and The Iron-Mountain Mining Company, appellants,
vs.
THE DETROIT AND CLEVELAND STEAM NAVIgation Company, respondent.

To the honorable the circuit court of the United States for the Northern district of Ohio, in the sixth circuit.

2 The appeal of the above-named appellants respectfully showeth:

That, on or about the 12th day of November, A. D. 1869, the above-named appellants exhibited their libel in the district court of the United States for the northern district of Ohio against the above-named respondent, each claiming over fifty dollars, exclusive of costs, which is disputed by respondent, praying, among other things, for the reasons set forth in said libel, that said respondent might be condemned to pay the demands of said libellants, and costs in said libel mentioned.

That the steamer R. N. Rice, belonging to said respondent, having been seized under process issued from said court, the said respondents did, on or about the 6th day of December, A. D. 1869, file in said district court its plea to the jurisdiction of said district court, praying that said libel be dismissed with its costs in that behalf; that, thereafter, on or about the 19th day of February, A. D. 1870, the said respondent filed in said district court its answer to said libel, praying that said libel be dismissed, with its costs in that behalf; said answer having been filed under a stipulation between the said appellants and said respondent, providing that the rights of said respondent under said plea to the juris-

diction should not be prejudiced by the filing of said answer, which said stipulation was filed in said district court on or about the first day of March, A. D. 1871; all of which will more fully appear by reference to said libel, plea to the jurisdiction, answer, and stipulation.

That the said cause came on to be heard before the Honorable Charles T. Sherman, judge of the said district court, at the January term thereof, on or about the 1st day of March, A. D. 1871, upon the libel of
3 the said appellants, and the plea to the jurisdiction filed by said respondent; and the said judge having advised thereon, on the 30th day of March, A. D. 1871, made a decree in said cause, whereby it was decreed that the said respondent's plea to the jurisdiction of said district court be sustained, and that the libel of said appellants be dismissed for want of jurisdiction in said court; and that said appellants pay the costs in said cause to be taxed.

And these appellants are advised and insist that the said decree is erroneous, inasmuch as the said district court had jurisdiction of the said cause, and of the respondent therein, and these appellants, for these and other reasons, appeal from the whole of said decree in favor of said respondent, to the next circuit court, to be held in the said district; and on the said appeal they intend to have the said cause heard anew in the circuit court, on the pleadings and proofs in the district court, and other proofs covering the whole issue, sustaining the averments of the libel, and rebutting the proofs of the respondent, to be introduced in the said circuit court.

And they pray that the record and proceedings may be returned to the said circuit court, and that the said decree may be reversed, or such other decree thereon be made as to said circuit court shall seem just; and that the appellee may be compelled to pay to the appellents their costs and damages in the premises.

WILLEY, CARY & TERRELL,
Proctors for Appellants.

NORTHERN DISTRICT OF OHIO, *ss:*

being duly sworn, says that he is one of the proctors for the appellants, and that, on the day of April, A. D. 1871, he served a copy of the foregoing appeal on , one of
4 the proctors of the appellee, by delivering the same to him personally.

And afterward, to wit, on the tenth day of May, A. D. 1871, the following transcript of the record and proceedings in said district court in said cause was duly filed herein in said circuit court, which is in the words and figures following, to wit:

TRANSCRIPT.

January term, A. D. 1871.

At a stated term of the district court of the United States for the northern district of Ohio, begun and held at Cleveland, in said district, on the first Tuesday of January, being the third day of that month, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States of America the ninety-fifth—present, the Honorable Charles T. Sherman, district judge—among the proceedings then and there had were the following, to wit:

THE NEW ENGLAND MUTUAL INSURANCE COMPANY, The Independent Insurance Company, The Republic Insurance Company, The Equitable Insurance Company, and The Iron-Mountain Mining Company, *vs.* THE DETROIT & CLEVELAND STEAM NAVIGATION Company.	No. 582. In admiralty. Collision.

Be it remembered that, heretofore, to wit, on the 12th day of November, A. D. 1869, came the libellants, by Willey, Cary & Terrell, their proctors, and filed in the clerk's office of said district court their libel; which is in the words and figures following, to wit:

Libel.

In the district court of the United States for the northern district of Ohio. In admiralty.

To the Honorable Charles T. Sherman, judge of the district court of the United States for the northern district of Ohio:

The libel of The New England Mutual Insurance Company, The Independent Insurance Company, both of Boston, Massachusetts; The
5 Republic Insurance Company, The Equitable Insurance Company, both of Chicago, Illinois—each and all insurers of vessels against marine risks; and The Iron-Mountain Mining Company, of the State of Michigan, engaged in the business of mining, against The Detroit & Cleveland Steam Navigation Company, of the State of Michigan, carriers, in a cause of collision, civil and maritime. And thereupon the libellants allege and articulately propound as follows:

First. That the libellants now are, and during all the time herein mentioned were, corporations, and are and were during all of said times, bodies corporate and politic, duly created and existing by and under the laws of the following States, respectively, to wit: The said New England Mutual Insurance Company, and the said Independent Insurance Company, by and under the laws of the State of Massachusetts; the said Republic Insurance Company, and the said Equitable Insurance Company, by and under the laws of the State of Illinois; and the said Iron-Mountain Mining Com., by and under the laws of the State of Michigan. And that the respondent the said Detroit and Cleveland Steam Navigation Company is, and during all the times herein mentioned was, a corporation duly created and existing by and under the laws of the State of Michigan.

Second. That, at the time when the cause or causes of action hereinafter stated arose, the barque Courtland and the steamer Morning Star were vessels of twenty tons burthen and upwards, enrolled and licensed for the coasting trade, and employed in the busi-
6 ness of commerce and navigation between ports and places in different States and Territories, and upon the lakes and navigable waters connecting the said lakes, within the true meaning and intent of the act of Congress, one Asahel P. Lyman, of Sheboygan, Wisconsin, being the sole owner of the barque Courtland, and the respondent, the said Detroit and Cleveland Steam Navigation Company, being the sole owner of the said steamboat Morning Star.

Third. That, on or about the 12th day of June, 1868, the said barque Courtland, with one James W. Louden as master, set sail from the port

of Escanaba, in the State of Michigan, having on board a cargo of 891 tons of iron ore, bound for the port of Cleveland, in the State of Ohio. That the said barque proceeded on her said voyage safely and without accident, until shortly before twelve o'clock on the night of the 20th of June, A. D. 1868, when, having reached a point about twenty miles west-northwest of the port of Cleveland, and being on Lake Erie, the said barque Courtland being at that time on a course of east-by-north-half north, and so continuing until the collision herein mentioned, with her port-tacks aboard, made the lights of a steamboat, which afterwards proved to be the steamboat Morning Star, to the leeward of her course, the said steamboat being on a course west-northwest; that the night was dark but not foggy, with the wind north-by-east, or thereabouts, where it continued until the collision herein mentioned, blowing fresh;

7 that the said barque was sailing close-hauled, full-and-by, with her signal-lights as required by law, properly placed and screened and brightly burning, until the collision herein mentioned, so as to have been plainly visible to those in charge of the Morning Star, had they been duly vigilant, off her port-bow, for several minutes before the collision herein mentioned, and in ample time to have enabled the Morning Star to avoid the said Courtland, although said vessels were running in such a manner as to involve risk of collision unless proper measures were taken by the Morning Star to avoid it; that said Courtland was at the time tight, staunch, and strong, and in every respect well manned, tackled, appareled, and equipped, having the usual and necessary complement of officers and men, stationed at their proper posts and places, and respectively attentive and vigilant, keeping watch and ward for the safe navigation of their vessel, which they continued to do, using all possible care and precaution until the collision herein mentioned; that for some minutes before the collision herein mentioned the bells of the said barque Courtland were loudly rung; that the said Morning Star neither kept a good lookout so as to promptly make and duly watch and understand the lights and approach and movements of the Courtland, nor slackened duly her speed, nor duly stopped or reversed her engines, as required by law, nor shaped her course so as to avoid the said Courtland, as she might and should have done, in consequence of which faults and neglects the said Morning Star ran with great force and violence into and upon, and collided with the said Courtland, strik-

8 ing the said Courtland on her starboard side about fifteen feet forward of her mizzen-rigging, and so crushing the said Courtland that she sunk in about two hours, in twelve fathoms of water, the said collision then and there causing an actual total loss of the said barque Courtland and her said cargo; that between the collision and the sinking of the said Courtland, there was not time sufficient, *there was not time sufficient*, nor could any efforts have availed to save said Courtland or her cargo, or any part thereof, or prevent such actual total loss thereof; the said collision occurred about twenty minutes after the lights of the said Morning Star were first discovered by those on board of the Courtland, and that said *said* libellants sustained therefrom the damages hereinafter mentioned.

Fourth. That, at the time of the said collision, the said barque Courtland, owned by Asahel P. Lyman as aforesaid, was worth and of the value of fifty thousand dollars, ($50,000,) and that at the time of said collision, libellant, the said Iron-Mountain Mining Company, was the owner of the following-described property, which was on board of the said Courtland, and comprised her cargo for the said voyage, to wit, 891 tons of iron ore, worth and of the value of three thousand five hun-

dred and sixty-four dollars, ($3,564,) which went down with the said Courtland, and became thereby a total loss to the said libellant, the said Iron Mountain Mining Company; that libellants, the said insurance companies, had issued to the said Asahel P. Lyman, their policies and contracts of insurance, which were outstanding and valid at the time of said collision, by which libellants, said insurance companies,
9 insured said barque Courtland to the said Lyman, owner thereof, against marine risks and disasters, one of which risks, so insured against, was that of collision, and that they thus insured the same to said Lyman as aforesaid, each in and to the sum hereinafter set forth respectively, to wit: The New England Insurance Company in and to the sum of seven thousand five hundred dollars, ($7,500;) The Independent Insurance Company, in and to the sum of seven thousand five hundred dollars, ($7,500;) The Republic Insurance Company in and to the sum of two thousand five hundred dollars, ($2,500;) and The Equitable Insurance Company in and to the sum of two thousand five hundred dollars, ($2,500;) that there was other insurance outstanding on said barque at the time of said collision, the total insurance thereon at the time having been thirty-six thousand dollars, ($36,000,) leaving nine thousand dollars ($9,000) of her insurable value uninsured, and at the risk of her owner; that, by reason of the said collision, and the loss and damage thereby occasioned, libellants, the said insurance companies became liable and bound to pay, and shortly after said collision did pay to said Asahel P. Lyman, owner of said barque, the above-mentioned respective sums, each so insured by them; that, since the said collision and loss, the said Asahel P. Lyman, owner as aforesaid, has abandoned, transferred, and assigned to libellants, the said insurance companies, the said barque Courtland so insured, and all his interest therein, together with all hope of recovering the same, if any, and all the right the said owner of said barque Courtland had, or might have, or be entitled to, to sue for and recover the damages sustained in and by
10 the loss of the said barque Courtland, and for the value thereof, to the value of the insurance above set forth, which abandonment, transfer, and assignment were, and have been, accepted by the libellants, the said insurance companies; and libellants, the said insurance companies, have paid to the said Asahel P. Lyman, owner of said barque Courtland, the said sums so due him upon their said policies of insurance, to wit: The said New England Insurance Company the sum of $7,500; The Independent Insurance Company the sum of $7,500; The Republic Insurance Company the sum of $2,500; & The Equitable Insurance Company the sum of $2,500, and have thereby become subrogated to, and entitled to enforce, all the rights, claims, and demands to the said barque Courtland, and for the loss thereof against respondent, the said Detroit & Cleveland Steam Navigation Company, owner of the said Morning Star, that said Asahel P. Lyman, owner of said barque, would or could have in the premises, to the total amount of their said insurance, to wit, twenty thousand dollars, ($20,000;) that libellant, said Iron-Mountain Mining Company, has a claim against said respondent, said Detroit & Cleveland Steam Navigation Company, owner of said Morning Star, for the value of said cargo of iron-ore so lost, to wit, $3,564.00, and that said claims, amounting in all to the sum of $23,564.00 with interest, are enforceable in this court.

Fifth. That the aforesaid collision was occasioned solely by the negligence, unskilfullness, carelessness, and improper conduct of those in charge of and navigating the said steamboat Morning Star, and not through or by any fault, negligence or improper conduct on the part of the said barque Courtland, her master or crew.

11 Sixth. That the said Detroit and Cleveland Steam Navigation Company are possessed of certain personal property within the said northern district of Ohio, and within the maritime and admiralty jurisdiction of this court, to wit, of the steamboat R. N. Rice, her tackle, apparel, furniture, and appurtenances, and of other personal property.

Seventh. That all and singular the premises are true, and within the admiralty jurisdiction of this court. In verification whereof, if denied, the libellants crave leave to refer to the depositions and other proofs to be by them exhibited in the cause.

Wherefore the libellants pray that process, in due form of law, according to the course of the admiralty and of this court in causes of admiralty and maritime jurisdiction, may issue against the said respondent and against the said steamboat R. N. Rice, her tackle, apparel, furniture, and appurtenances, or any other property to the respondent belonging within the said district; and that the said property or any part thereof may be attached and held to enforce the appearance of said respondent in this court, to answer the matters herein propounded, and to answer the damages which may be awarded to the libellants for the causes aforesaid; and that this court would be pleased to pronounce for the damages aforesaid, and to decree such damages to the libellants as shall to law and justice appertain.

THE NEW ENGLAND MUTUAL INSURANCE COMPANY.
THE INDEPENDENT INSURANCE COMPANY.
THE REPUBLIC INSURANCE COMPANY.
THE EQUITABLE INSURANCE COMPANY.
THE IRON-MOUNTAIN MINING COMPANY.
By WILLEY, CARY & TERRELL, *their Proctors.*
WILLEY, CARY & TERRELL, *Proctors for Libellants.*

NORTHERN DISTRICT OF OHIO, *ss:*

On this 12th day of November, A. D. 1869, personally appeared
12 George E. Hall, president of The Iron Mountain Mining Company, one of the within-named libellants, and was sworn to the truth of the foregoing libel.

EARL BILL, *Clerk.*

And, also, upon said 12th day of November, A. D. 1869, was filed in the clerk's office of the court aforesaid the following libellants' stipulation for costs, which is in the words and figures following, to wit:

Libellants' stipulation for costs.

District court of the United States for the northern district of Ohio, ss.
In admiralty.

Whereas a libel was filed in this court on the 12th day of November, 1869, by The New England Mutual Insurance Company, The Independent Insurance Company, The Republic Insurance Company, The Equitable Insurance Company, & The Iron-Mountain Mining Company, against The Detroit & Cleveland Steam Navigation Company, for the reasons & causes in the said libel mentioned; and the said libellants and George E. Hall & George Willey, The Iron-Mountain Mining Company, Willey & Cary & John E Cary, sureties, the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the libellants or their sureties, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulators, undersigned, shall be, and are, bound in the sum of two hundred and fifty dollars; conditioned that the libellants above-named shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the appellate court.

THE IRON-MOUNTAIN MINING COMPANY.
Per GEO. E. HALL, *Pres't.*
G. E. HALL.
WILLEY & CARY.
GEO. WILLEY.
JOHN E. CARY.

13 Taken and acknowledged this 12th day of November, 1869, before me.

EARL BILL, *Clerk.*

And on said 12th day of November, A. D. 1869, the following affidavits were duly filed in said clerk's office by said libellants, which are respectively in the words and figures following, to wit:

Affidavit.

In the district court of the United States for the northern district of Ohio.

THE NEW ENGLAND MUTUAL INSURANCE Company et al.
vs.
THE DETROIT & CLEVELAND STEAM NAVIgation Company.
} Affidavit.

GEORGE E. HALL, president of The Iron-Mountain Mining Company, libellant, being first duly sworn, says that respondent is a corporation in the State of Michigan, out of the jurisdiction of this court, so that process cannot be served upon it; that Lawson A. Pierce, of Cleveland, Ohio, within said district, has money or property, rights or credits, in his hands belonging to respondent; and that, in order to enforce the appearance of said respondent in this case, it is necessary that attachment of garnishment against said Pierce be included in the process ordered by the court in this case.

G. E. HALL.

Subscribed and sworn to before me this 12th day of November, A. D. 1869.

EARL BILL, *Clerk.*

Affidavit.

In the district court of the United States for the northern district of Ohio. In admiralty.

THE NEW ENGLAND MUTUAL INS. CO., THE Independent Ins. Co., The Republic Insurance Co., The Equitable Ins. Co., & The Iron-Mountain Mining Co.,
vs.
THE DETROIT & CLEVELAND STEAM NAVIgation Company.
} Affidavit.

GEORGE E. HALL, being first duly sworn, says that he is president of The Iron-Mountain Mining Company; that respondent, The Detroit

& Cleveland Steam Navigation Company, is a foreign corporation, with chief office at Detroit, Michigan; that the steamers R. N. Rice
14 & Northwest, belonging to respondent, run to the port of Cleveland, in said district; that the season of navigation is nearly closed, and said steamers will soon be laid up for the winter at Detroit, Michigan, out of the jurisdiction of this court; that service cannot be got upon respondent, and that it is necessary for process to issue against one of the said steamers, to wit, the R. N. Rice, as prayed for in the libel.

G. E. HALL.

Subscribed and sworn to before me this 12th day of November, A. D. 1869.

EARL BILL, *Clerk.*

And thereupon, at the September term of said court, to wit, on the 12th day of November, A. D. 1869, the following order was made and entered herein, in the words and figures following, to wit:

Order for warrant of arrest, &c.

On motion to the court by Willey, Cary & Terrell, proctors for the libellants, and upon the filing of the proper proofs showing the propriety thereof, it is ordered that a warrant of arrest be issued against the said respondent, with a clause therein that if it cannot be found to attach its goods and chattels to the amount of $23,564, or if such property cannot be found to attach its credits and effects to the same amount, in the hands of Lawson A. Pierce, as garnishee; and that said warrant be made returnable on the first Monday of December next.

And thereupon the following warrant of arrest & attachment was duly issued by the clerk of said court, which is in the words and figures following, to wit:

Warrant of arrest & attachment.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the marshal of the northern district of Ohio, and to his deputy, whomsoever, greeting:

You are hereby, jointly & severally, empowered and strictly
15 enjoined and commanded that you arrest The Detroit & Cleveland Steam Navigation Company, of the State of Michigan, if it be found within your district; and, if so arrested, you keep under safe and secure arrest, so that it may be had and forthcoming before the judge of the district court of the United States of America for the northern district of Ohio, at Cleveland, on the first Monday of December next, if it be a court day, else on the court day following, at ten o'clock in the forenoon, there to answer unto The New England Mutual Insurance Company & The Independence Insurance Company, both of Boston, Massachusetts; The Republic Insurance Company and the Equitable Insurance Company, both of Chicago, Illinois; and The Iron-Mountain Mining Company, of the State of Michigan, in a cause of collision, civil and maritime; and further to do and receive in this behalf as shall to justice appertain.

And you are hereby further empowered and strictly enjoined and commanded that, if the said Detroit and Cleveland Steam Navigation

Company is not found within your district, you attach its goods and chattels to the amount of twenty-three thousand five hundred and sixty-four dollars, ($23,564,) or if no goods and chattels of the said Detroit and Cleveland Steam Navigation Company be found in your district, that you attach its credits and effects in the hands of Lawson A. Pierce, of Cleveland, in the State of Ohio, to the same amount; and that you 'monish and cite peremptorily and personally the said Lawson A. Pierce to appear before the aforesaid judge, on the day and at
16 the place aforesaid, then and there to answer, on oath or solemn affirmation, as to the debts, credits, or effects of the said Detroit & Cleveland Steam Navigation Company in his hands, and to such interrogatories touching the same as shall be propounded in behalf of the said New England Mutual Insurance Company, Independent Insurance Company, Republic Insurance Company, Equitable Insurance Company, and Iron-Mountain Mining Company; and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the aforesaid judge what you shall have done in the premises, together with these presents.

Witness the Honorable Charles T. Sherman, judge of the said court, at Cleveland, this 12th day of November, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-fourth.

[SEAL.] EARL BILL, *Clerk.*

And afterward, to wit, on the 13th day of November, A. D. 1869, said writ was duly returned to said clerk's office by said marshal, with his proceedings thereon endorsed in the words and figures following, to wit:

Marshal's return on writ.

NORTHERN DISTRICT OF OHIO, *ss:*

In obedience to the command of the court, as set forth in the within writ, first having made diligent search and failed to find the within-named Detroit and Cleveland Steam Navigation Company in the aforesaid district, I, on the 12th day of November, A. D. 1869, attached the following goods and chattels of said company, to wit, the steamboat R. N. Rice, her engines, boilers, boats, tackle, apparel, and furniture, at the port of Cleveland, in said district, and hold the same in
17 my custody, subject to the further order of the court. I also left on board of said steamboat a true copy of this writ duly certified, & appointed W'm T. Crump keeper.

R. HASTINGS, *U. S. Marshal.*
By E. A. ABBOTT, *Deputy.*

And afterwards, to wit, on said November 13th, 1869, was filed in the said clerk's office, the following stipulation of defendant, which is in the words and figures following to wit:

Def'ts' stipulation.

UNITED STATES DISTRICT COURT,
Northern District of Ohio, ss:

Whereas a libel was filed in the district court of the United States for the northern district of Ohio, on the 12th day of November, A. D.

1869, by The New England Mutual Insurance Company and The Independant Insurance Company, both of Boston, Massachusetts; The Republic Insurance Company and The Equitable Insurance Company, both of Chicago, Illinois; and The Iron-Mountain Mining Company, of the State of Michigan, against The Detroit & Cleveland Steam Navgation Company, of the said State of Michigan, in a cause of collision, civil and maritime, for the reasons and causes set forth in the said libel.

And whereas by virtue of process issued to the marshal of said district, in pursuance of the prayer of said libel, the said marshal has attached the following property of the said Detroit and Cleveland Steam Navigation Company, to wit, the steamboat R. N. Rice, her engines, boats, tackle, apparel, and furniture; and the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the said Detroit and Cleveland Steam Navigation Company, or its sureties, execution may issue against their goods, chattels, and lands:

Now, therefore, it is hereby stipulated and agreed, for the ben-
18 efit of whom it may concern, that the stipulators undersigned, and each of them, are bound in the sum of forty-seven thousand one hundred and twenty-eight dollars, ($47.128,) conditioned that they should abide all orders, interlocutory or final, of the said district court, or of any appellate court to which the above-named suit may proceed, and pay the amount awarded by the final decree rendered in the said district court or the appellate court, if any appeal shall intervene.

DETROIT AND CLEVELAND STEAM NAVIGATION COMPANY.
By L. A. PIERCE, *Agent.*
W. F. OTIS.

Taken and acknowledged this 13th day of November, A. D. 1869, before me.

EARL BILL,
Clerk of said Court.

And afterward, to wit, at said September term of said court, to wit, on the said 13th day of November, 1869.

Order dissolving attachment.

The marshal having returned the mesne process issued in this cause that the said defendant cannot be found in his district, and that, by virtue of the the said process, he had attached the following-described property of said defendant, to wit, the steamboat R. N. Rice, her engines, boats, tackle, apparel, and furniture; and the said defendant having executed and filed in this court its stipulation in the sum of forty-seven thousand one hundred and twenty-eight dollars, conditioned to abide all orders, interlocutory or final, of this court or any appellate court to which this suit may proceed, and pay the amount awarded by the final decree of this court or the appellate court, if any appeal shall intervene, with Lawson A. Pierce and William F. Otis, as sureties; and said sureties being deemed sufficient, the said stipulation is hereby approved and it is ordered that said attachment be, and the same is hereby, dissolved.

19 And afterwards, to wit, on the 6th day of December, A. D. 1869, the following plea to the jurisdiction was duly filed herein in said clerk's office, which is in the words and figures following, to wit:

Plea to the jurisdiction.

THE NEW ENGLAND MUTUAL INSURANCE COMPANY, The Independant Insurance Company, The Republic Insurance Company, & The Iron-Mountain Mining Company,
vs.
THE DETROIT & CLEVELAND STEAM NAVIGATION Company.

District court of the United States for the northern district of Ohio.

And now comes the said "The Detroit & Cleveland Steam Navigation Company," by William A. Moore, its proctor and attorney, and, protesting against the issuing of the process, the service of the same, & form (this appearance being special not general, and not confessing the jurisdiction of this court, but appearing merely for the purpose of protesting against the said process & service) as the same has been issued and served in the libel and complaint of "The New England Mutual Insurance Company," "The Independent Insurance Company," "The Republic Insurance Company," and "The Iron-Mountain Mining Company," filed in said court in the northern district of Ohio, against the said "The Detroit and Cleveland Steam Navigation Company," says:

That "The Detroit and Cleveland Steam Navigation Company" is a body corporate and incorporated under and by virtue of an act of the legislature of the State of Michigan, the said act being entitled "An act to authorize the formation of corporation' for the purpose of engaging in commerce and navigation," and approved Feb'y 21st, 1867, and is an inhabitant of the State and eastern district of Michigan, and is not an inhabitant of the State and northern district of Ohio, in which said suit is pending; that this honorable court here has no cognizance of or jurisdiction over said corporation or the subject-matters alleged in the libel filed by said libellants, to compel or require the said defendants to appear, plead, or answer to the said libel or complaint; that said defendant, "The Detroit and Cleveland Steam Navigation Company, can alone be compelled and required to appear and plead or answer to the matter in the State and eastern district of Michigan, and that the district court of the United States for the northern district of Ohio has no jurisdiction to proceed against the defendant, "The Detroit & Cleveland Steam Navigation Company," or its property in this cause.

Wherefore the said Detroit and Cleveland Steam Navigation Company prays that this honorable court will be pleased to pronounce against the libel filed in said cause, the process and the service thereof, and all proceedings therein, and that said libel may be dismissed with costs of suit.

The Detroit & Cleveland Steam Navigation Company.
By JNO. OWEN, *Its President.*
WILLIAM A. MOORE,
Proctor and Attorney for Respondent.
R. P. RAMSEY, *Of Counsel.*

STATE OF MICHIGAN,
Wayne County, ss:

John Owen, of said county and State, being by me duly sworn, says that he is the president of the above-named Detroit and Cleveland

Steam Navigation Company; that he signed the foregoing plea for and on behalf of said company and as its president; that he has heard read said plea and knows the contents thereof and that the same is true in substance and in fact as he verily believes.

J. OWEN.

Sworn to & subscribed before me this 3rd day of December, A. D. 1869.

S. J. KELSO,
Notary Public, Wayne Co., Michigan.

21 And afterward, to wit, on the 19th day of February, A. D. 1870, the following answer of said respondent was duly filed herein in said clerk's office, which is in the words and figures following, to wit:

Answer.

In the district court of the United States for the northern district of Ohio. In admiralty.

The answer of "The Detroit and Cleveland Steam Navigation Company" to the libel and complaint of The New England Mutual Insurance Company, The Independent Insurance Company, The Republic Insurance Company, The Equitable Insurance Company, and The Iron-Mountain Mining Company, filed in said court against The Detroit & Cleveland Steam Navigation Company, answering, subject and without prejudice to the plea to the jurisdiction heretofore filed in said cause, and, without waiving the same, or any rights thereunder, alleges as follows:

First. That this respondent is not informed as to the existence and organization of the said several companies composing the libellants in this cause, and therefore denies the same as alleged in the first article of said libel; that this respondent admits the character and existence of this respondent as alleged in the first article of said libel.

Second. That this respondent admits the burthen, enrollment, license, and employment of the steamboat "Morning Star," and of the barque Courtlandt, as alleged; admits, upon information and belief, that said Asiel P. Lyman, of Sheboygan, Wisconsin, was the sole owner of the barque as alleged in the second article of said libel.

22 Third. That this respondent, on information and belief, admits that, on or about the night of the 20th of June, A. D. 1868, the said barque Courtlandt, with James W. Louden as master, was on a voyage from the port of Escanaba, in the State of Michigan, to the port of Cleveland, in the State of Ohio; admits that she had a cargo of some nine hundred tons of iron-ore; admits that when she had reached a point about twenty miles west-northwest of the port of Cleveland, her lookout made the light of the steamer "Morning Star," a little to the leeward of her course; admits that the night was dark, but not foggy; admits that the wind was north-by-east, or thereabouts, and blowing fresh, and that the said barque was close-hauled, with her port tacks aboard. But this respondent denies that the said barque had her signal-lights properly placed, and screened, and brightly burning, and that the same were visible to those in charge of the steamer, as alleged in the third article of said libel; that this respondent denies that said barque was tight, staunch, and strong; denies that she had the usual

and necessary complement of officers and men, stationed at their proper posts and places, & attentive to their several duties; denies that all possible care and precaution were used by those navigating the said barque to avoid the said collision; denies that the said barque Courtlandt exhibited to those navigating the said steamer any light whatever on the respective courses of the two vessels, as alleged in said libel; that this respondent admits that a collision took place at or about the time and place mentioned between said steamer and
23 said barque, and admits that the said barque and the said steamer, with their cargoes, were so damaged by said collision that both the steamer "Morning Star" and the barque Courtlandt sunk in a very short time thereafter in about twelve fathoms of water; but this respondent denies that said collision was in any manner caused by any carelessness, negligence, or unskilfullness on the part of those navigating said steamer, as alleged in the third article of said libel.

Fourth. That this respondent, on information and belief, admits that the said barque Courtlandt was the property of the said Asael P. Lyman as aforesaid, and was of the value of from forty to fifty thousand dollars; but this respondent has no knowledge, except that derived from said libel, as to the ownership of the cargo of said barque, or of the amounts of insurance insured by the said libellants, respectively, to said Lyman, as owner of said barque, or of the amounts, respectively, paid by said libellants to the said Lyman, as alleged in the fourth article of said libel; and this respondent, therefore, denies all allegations of the right of said libellants to recover of this respondent by reason of the said several allegations, or any of them in the 4th article of said libel contained.

Fifth. That this respondent denies that said collision was caused solely, or was in any manner aided, by any negligence, carelessness, unskilfulness, or improper conduct of those navigating the "Morning Star," as alleged in the fifth article of said libel; that this respondent alleges that the said steamer Morning Star, on the evening of the day last aforesaid, left the port of Cleveland, in the State of Ohio,
24 bound for the port of Detroit, in the State of Michigan; that she had her cargo of general merchandise sufficiently stowed; that she was tight, staunch, and strong, and was in every respest fit for the voyage she was then prosecuting; that she had her full complement of officers and men, properly stationed and vigilantly attentive to their respective duties, keeping watch and ward for the safe navigation of their said vessel; that her signal-lights were properly set and brightly burning; that the night was dark, though not foggy; that while said steamer was running at a moderate speed, with her master, second-mate, and lookout, all being men of great experience, and stationed forward, and in the best position to make the lights or sails of an approaching vessel; that, when she had reached about the position alleged in said libel, suddenly the sails of a vessel were disclosed to the officers and lookout of the steamer, said vessel being nearly dead ahead, but crossing a little from the port to the starboard side, and but a short distance from the bow of the said steamer; that the wheel was immediately put to starboard, the engine checked, stopped, and reversed; but so short was the distance between the vessels that the steamer, and the vessel, which proved to be the barque Courtland', almost immediately thereafter came together, the starboard bow of the steamer striking the barque on the starboard side, between her main and mizzen rigging, causing them both to sink in a short time thereafter as aforesaid; that this respondent alleges that, at the time of said collision, and for some

time prior thereto, the said barque had been running carrying
25 full sail, and at a speed of some seven or eight miles an hour;
that she had no competent & proper officers on deck in charge of her; that the night was so dark that a vessel running to the westward could not see an approaching vessel, running without her proper lights, until close upon her; that the said barque had no proper lights properly placed and visible to those navigating a vessel approaching as was the said steamer, and that the said collision and damage were caused solely and entirely by the carelessness, negligence, and unskilfulness of those navigating the said barque Courtlandt; and the respondent, by said collision and damage, lost the said steamer Morning Star entirely, and every part thereof, which said steamer, her engines, boats, &c., were of the value of, at least, one hundred and twenty-five thousand dollars, and, as this respondent claims, this respondent has a claim against the said Asael P. Lyman, the owner of the said barque, for such loss and damage.

And this respondent, further answering, and as a further answer to the claim of said libellants set up in said libel, says that said steamer was a total loss to this respondent; that this respondent had no insurance on said steamer, her freight or cargo, at the time of said loss; that this respondent derived nothing from the freight or cargo on her said trip; and this respondent alleges, as he is informed and believes, that this respondent is fully protected as a matter of law against any recovery sought by the said libellants by their said suit against this respondent, by virtue of an act passed the Congress of the
United States, the same being entitled, "An act to limit the
26 liability of ship-owners," and approved March 3rd, 1851, to which
act reference is hereby made, and the whole thereof referred to as a part of the answer of this respondent in this cause; that this respondent is ready and willing to make any assignment of its interest in said steamer, its freight and cargo, to whoever may be entitled to the same; and this respondent claims the same benefit and advantage under and by virtue of the said act, as if this respondent had plead the same specially.

Sixth. That this respondent denies that the said libellants, or either of them, have any claim whatever against this respondent or its property by reason of the allegations in their said libel contained; denies that they have any claim against this respondent or its property upon the facts as set up, and as will be proven by this respondent.

Wherefore, this respondent prays that the said libel may be dismissed, with costs of suit to be taxed.

The Detroit and Cleveland Steam Navigation Company.
By J. OWEN, *President.*

STATE & EASTERN DISTRICT OF MICHIGAN, *ss:*

John Owen, of said State & district, being by me duly sworn says, that he is the president of the Detroit & Cleveland Steam Navigation Company, on whose behalf he subscribed the foregoing answer, and knows the contents thereof, and that the same is true, as he verily believes.

J. OWEN.

Subscribed and sworn to before me, this 8th day of February, A. D. 1870.

W'M D. WILKINS,
Clerk U. S. Circuit Court, East. Dist. of Mich'n. &
U. S. Commissioner for said District.

And afterwards, on said 19th day of February, A. D. 1870, the following cross-libel was duly filed herein in said clerk's office, which is
27 in the words and figures following, to wit:

Cross-libel.

In the district court of the United States for the northern district of Ohio. In admiralty.

To the Honorable Charles T. Sherman, judge of the district court in and, for said district:

The libel of The Detroit & Cleveland Steam Navigation Company against The New England Mutual Insurance Company, The Independent Insurance Company, of Boston, Massachusetts; The Republic Insurance Company, The Equitable Insurance Company of Chicago, Illinois; and The Iron-Mountain Mining Company of the State of Michigan, in a cause of collision, civil & maritime, alleges as follows:

First. That this libellant is a body corporate and politic, organized and existing under and by virtue of an act of the legislature of the State of Michigan, entitled "An act to authorize the formation of corporations for the purpose of engaging in commerce and navigation," and approved February 21st, 1867.

Second. That, on the 12th day of November, A. D. 1869, the said respondents filed, in the above-entitled court, a libel against this libellant, in which libel they allege that, on or about the 21st day of June, A. D. 1868, the barque "Courtlandt" collided with the steamer "Morning Star," at a point in Lake Erie, some twenty miles west-northwest from the port of Cleveland, and that by the said collision the said barque "Courtlandt" was sunken and lost; that the said barque Courtlandt was the property of one Aasahel P. Lyman, to whom the said respondents, the four insurance companies named, had respectively issued policies of insurance upon the said barque; that, after
28 the loss of the said barque, they had respectively paid to the said Lyman the several amounts insured to the said Lyman, and that they had become thereby entitled to all the rights and privileges of the said Lyman for the recovery of the damages suffered by the said Lyman by the said collision; that the said Iron-Mountain Mining Company claimed in the said libel to be the owner of some eight hundred and ninety-one tons of iron-ore, composing the cargo of the said barque Courtlandt, and that by reason of said collision and loss of the said vessel and cargo, the said Iron-Mountain Mining Company had suffered a loss of three thousand five hundred and sixty-four dollars, ($3,564;) That the said four insurance companies claimed respectively as follows: The New England Mutual Insurance Company, seven thousand five hundred dollars, ($7,500;) The Independent Insurance Company, seven thousand five hundred dollars, ($7,500;) The Republic Insurance Company, two thousand five hundred dollars, ($2,500;) & The Equitable Insurance Company, two thousand five hundred dollars, making a total of twenty-three thousand five hundred and sixty-four dollars, ($23,564;) that the said respondents claimed said damages by reason of the collision aforesaid.

Third. That at the time of said collision this libellant was the sole, true, and only bona-fide owner of the steamer Morning Star, and, as this libellant is informed and believes, that the said barque Courtlandt was the property of one Asahel P. Lyman, of Sheboygan, in the State of

Wisconsin; that said steamer and said barque were both vessels of twenty tons burthen and upwards, were enrolled and licensed
29 for the coasting trade, and were engaged in commerce and navigation between ports and places in different States and territories upon the northwestern lakes and navigable waters connecting the same.

Fourth. That, on or about the evening of the 20th of June, A. D. 1868, the steamer "Morning Star," being tight, staunch, and strong, with her full complement of officers & crew, her cargo of general merchandise sufficiently stowed, at the hour of about ten and one-half o'clock, left the port of Cleveland, in the State of Ohio, bound for the port of Detroit, in the State of Michigan; that she was in every way fit for the voyage she was then prosecuting; that she had her officers, lookout, and watch properly stationed, and vigilantly attentive to their respective duties, keeping watch and ward for the safe navigation of the said vessel; that she had her signal-lights properly set, screened, and brightly burning; that the night was dark but not foggy; that when said steamer had reached upon her course a point some twenty miles west-northwest from Cleveland, and running at a moderate speed, with her master, second-mate, & lookout stationed forward in the best place to make the lights or sails of an approaching vessel, that suddenly the sails of a vessel were disclosed to the officers and lookout of the steamer, said vessel being nearly dead ahead, but crossing a little from the port to the starboard side, and but a short distance from the bow of the steamer; that the wheel was immediately put to starboard, the engine checked, stopped, and reversed, but so short was the distance between the
30 vessels that the steamer and the vessel, which proved to be the barque Courtland, immediately thereafter came together, the starboard bow of the steamer striking the barque on the starboard side, between the main & mizzen rigging, damaging both the steamer and the barque to so great an extent as to cause them to sink in a short time thereafter, in about ten or twelve fathoms of water, whereby, and by reason whereof, the steamer became a total loss to this libellant.

Fifth. That, at the time of the said collision, and for some time prior thereto, the said barque had been running carrying full sail, and at a speed of some seven or eight miles an hour; that she had no competent officers on deck in charge of her; that the night was so dark that a vessel running to the westward could not see an approahing vessel running without her proper lights until close upon her; that the said barque had no proper lights properly placed and visible to those navigating a vessel approaching, as was the said steamer; and that said collision and damage were caused solely and entirely by the carelessness, negligence, and unskilfulness of those navigating the said barque Courtlandt, and that the said collision did not arise from, nor was it contributed to in any manner by, fault, carelessness, or unskilfulness on the part of those navigating the steamer Morning Star, or of this libellant, her owner.

Sixth. That the said steamer Morning Star was of the value of at least one hundred and twenty-five thousand dollars, ($125,000,) and as the libellant alleges, he has a claim therefor against and a
31 lien upon the said barque Courtlandt, and also a claim against Asahel P. Lyman, her owner, which claim and lien this libellant alleges is enforceable in this court.

Seventh. That, by the said libel filed by The New England Mutual Insurance Company, The Independent Insurance Company, The Republic

Insurance Company, The Equitable Insurance Company, and The Iron-Mountain Mining Company, the said libellants therein claimed to be subrogated to all rights of the said Lyman, under and by virtue of the allegations in said libel contained; to which libel reference is hereby made, and to which this is filed as a cross-libel by this libellant.

Eighth. That this libellant claims that this libel is filed as a cross-libel, and upon a counter-claim, and arises out of the same cause of action as the one for which the original libel was filed in this court against this libellant by the said New England Mutual Insurance Company, The Independent Insurance Company, The Republic Insurance Company, and The Equitable Insurance Company, and The Iron-Mountain Insurance Company, to which libel reference is made.

Ninth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court; that this libel is filed in pursuance of rule No. 54 of the Supreme Court of the United States in admiralty, and this respondent claims under said rule that the said libellants in the original libel, and the respondents in this libel, shall give a bond to pay this libellant such damages as he shall to have sustained by said collision.

32 Wherefore this libellant prays that process, in due form of law, according to the course of admiralty and in causes of admiralty and maritime jurisdiction, may issue against the said respondents; that they may be cited to appear and answer all and singular the matters aforesaid, and that they shall be required to give bond to respond in such damages as this libellant shall, by proofs hereafter to be submitted by it in the case, be decreed to have suffered by said collision, and that all proceedings in said suit shall be stayed until the filing of such bond; that the said original and this cross-libel may be tried at one and the same time, and as one action, and that said respondents may be decreed to pay such *such* damages as this libellant shall be entitled to have and receive.

Detroit & Cleveland Steam Navigation Company,
By J. OWEN, *President.*
WILLIAM A. MOORE,
Proctor for libellant.

STATE & EASTERN DISTRICT OF MICHIGAN, *ss.*

John Owen of said State & district being by me duly sworn, says that he is the president of the Detroit & Cleveland Steam Navigation Company, on whose behalf he subscribed the foregoing libel; that he has read the foregoing libel, and knows the contents thereof, and that the same is true as he verily believes.

J. OWEN.

Subscribed and sworn to before me this 10th day of February, A. D. 1870.

W'M D. WILKINS,
Clerk U. S. Circuit Court, Eastern District of Michigan, & U. S. Commissioner for said District.

And thereupon on said 19th day of February, A. D. 1870, the following writ of monition was duly issued herein by the clerk of said court, which is in the words and figures following, to wit:

Monition.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

33 The President of the United States of America to the marshal of the northern district of Ohio, greeting:

Whereas a cross-libel was filed in the district court of the United States for the northern district of Ohio, on the 19th day of February, A. D. 1870, by The Detroit & Cleveland Steam Navigation Company, against The New England Mutual Insurance Company, The Independent Insurance Company, of Boston, Mass.; The Republic Insurance Company, The Equitable Insurance Company, of Chicago, Ill's; and The Iron-Mountain Mining Company of the State of Michigan, in a certain action, civil and maritime, in a cause of collision, and praying that a monition may issue against the said defendants, pursuant to the rules and practice of this court:

Now, therefore, you, the said marshal, are hereby commanded to cite and admonish the said New England Mutual Insurance Co., The Independent Insurance Co., of Boston, Mass.; The Republic Insurance Company, The Equitable Insurance Company of Chicago, Illinois; and The Iron-Mountain Mining Company of the State of Michigan, if they shall be found in your district, to be and appear before the said district court at the city of Cleveland, in said district, on the first Monday of March next, at 10 o'clock a. m. of said day, then and there to answer said libel, and to make their allegations in that behalf, and have you then and there this writ, with your return thereon.

Witness the Honorable Charles T. Sherman, judge of the said district court, at the city of Cleveland, this 19th day of February, in the year of our Lord one thousand eight hundred and seventy, and of the
34 Independence of the United States of America the 94th.

[SEAL] EARL BILL, *Clerk.*

W. A. MOORE,
Proctor for Libellant.

And, afterwards, to wit, on the 28th day of February, A. D. 1870, said writ was duly returned to said clerk's office by said marshal with his proceedings thereon endorsed in the words and figures following, to wit:

Return on monition.

NORTHERN DISTRICT OF OHIO, *ss:*

The within-named New England Mutual Insurance Company, The Independent Insurance Company, of Boston, Mass.; The Republic Insurance Company, The Equitable Insurance Company, of Chicago, Ills.; and the Irom-Mountain Mining Company of the State of Michigan, not being found in the district aforesaid, I, on the 26th day of February, A. D. 1870, delivered to Cary, of the firm of Willey, Cary & Terrell, their proctors, a true copy of this writ, duly certified.

R. HASTINGS, *U. S. Marshal.*
By H. THOMPSON, *Deputy.*

And afterwards, to wit, at the January term of said court, to wit, on the 28th day of February, A. D. 1871.

Hearing on plea, adjourned, &c.

This being the day appointed for the trial of this cause, came the parties by their proctors.

And thereupon, the court doth direct that a hearing of the same upon the plea to the jurisdiction of the court interposed by said defendant be first had.

And the said libellants not being fully prepared to proceed with said hearing, it was ordered that the same stand adjourned until to-morrow morning.

And, afterwards, to wit, on the 1st day of March, A. D. 1871, the two following stipulations were filed herein by the parties to this cause, which are respectively in the words and figures following to wit:

Stipulation as to answer, &c.

35 THE NEW ENGLAND MUTUAL INSURANCE Company, The Independent Insurance Company, The Republic Insurance Company, & The Iron-Mountain Mining Company.
vs.
THE DETROIT & CLEVELAND STEAM NAVIgation Company.

District court of the United States for the northern district of Ohio. In admiralty.

It is hereby stipulated by and between the parties to the above-entitled cause, that respondent may file his answer therein and thereto, without prejudice as to the plea to the jurisdiction heretofore filed by respondent therein, and that said cause may be brought to final hearing, leaving the said question of jurisdiction to the time of hearing upon the merits; and that the filing of an answer in said cause shall not be held or deemed a waiver of the rights of the respondent under his said plea to the jurisdiction. Any decree rendered in this cause shall state fully the grounds thereof.

WILLEY, CARY & TERRELL,
Proctors for Libellants.
W'M A. MOORE,
Proctor for Respondent.

Stipulation as to testimony.

THE NEW ENGLAND MUTUAL INSURANCE Company, The Independent Insurance Company, The Republic Insurance Company, The Equitable Insurance Company, and The Iron-Mountain Mining Company,
vs.
THE DETROIT & CLEVELAND STEAM NAVIgation Company.

AND

THE HOME INSURANCE COMPANY, OF NEW Haven; The Western Insurance Company, of Buffalo; The Cleveland Insurance Company, of Cleveland; The Germania Fire Insurance Company, The Hanover Fire Insurance Company, The Niagara Fire Insurance Company, & The Republic Fire Insurance-Company of New York,
36
vs.
THE DETROIT & CLEVELAND STEAM NAVIGATION Company.

In the district court of the United States, for the northern district of Ohio. In admiralty.

It is hereby stipulated by and between the parties to the above-entitled causes, that witnesses may be examined by either party thereto without prejudice to the rights of either party as to the question of jurisdiction involved in the plea filed by the respondent in said causes, and the taking of testimony by respondent shall not in any manner be deemed or held as a waiver of their plea to the jurisdiction, but the respondents shall have the same rights under their plea as if no testimony had been taken.

And it is further stipulated and agreed by and between the parties that any depositions heretofore taken, or that may be hereafter taken, in either of said causes, may be used and read as evidence (subject to the usual objections to form and substance) in both of said causes, the same as if taken and filed in each of said causes; and that the decision of that one of said causes which shall be first tried shall be deemed and considered a decision of the other of said causes also, or in other words, that the second of said causes shall abide the decision of the one first tried.

This agreement as to the use of depositions in evidence to apply to the circuit court of said district, if said causes go thus far.

Also, if an appeal be taken from the decision of said district court, in that one of said causes which shall be first tried, then the second of said causes to await the final determination of said cause so appealed,
37 and to abide by the result thereof.

WILLEY, CARY & TERRILL,
Proctors for Libellants.
W. A. MOORE,
Proctor for Respondent.

And afterward, to wit, at the January term of said court, to wit, on the 1st day of March, A. D. 1871.

Hearing on plea, &c.

Came again the parties, by their proctors, and this cause coming on to be heard upon the plea to the jurisdiction of this court, was argued by counsel.

And the said arguments being concluded the questions therein were taken under advisement by the court.

And afterwards, to wit, at the January term of said court, to wit, on the 30th day of March, A. D. 1871, was made and entered herein the following order and decree, to wit:

Plea sustained.

At this term this cause came on to be heard upon the libel and plea to the jurisdiction and was argued by counsel, whereupon, without any hearing upon the merits of said cause, it is hereby ordered and decreed that the said plea to the jurisdiction be sustained, and that the said libel stand dismissed for want of jurisdiction, as in said plea alleged, with costs.

And it is further ordered that the said libellants pay said costs within twenty days, or, in default thereof, that execution issue against them therefor.

It is further ordered that an appeal may be taken from this decree to the circuit court at any time within twenty days from the date hereof on security being given by the appellants, in the sum of five hundred dollars, its sufficiency to be approved according to the 22nd rule in admiralty of said district court.

And afterwards, to wit, on the day and year last above-mentioned,
38 was filed herein, in said district court, the following stipulation between the parties to this cause as to transcript in case of appeal, which said stipulation is in the words and figures following, to wit:

Stipulation as to transcript, &c.

THE NEW ENGLAND MUTUAL INSURANCE COMpany et al.,
vs.
THE DETROIT AND CLEVELAND STEAM NAVIgation Company.

In the circuit court of the United States for the northern district of Ohio. On appeal in admiralty.

It is hereby stipulated, by and between the proctors & counsel of the respective parties to the above-entitled cause, that on appeal from the decree dismissing the libel entered in said cause, the original depositions taken and filed in said cause in the district court may be certified up to this court by the clerk of the district court in said district, together with the exhibits attached or referred to in said depositions, instead of making copies of said depositions and exhibits; and that as to all pleadings, proofs, and exhibits, the original instead of copies may be made a part of the record required by No. 53rd of the U. S. Supreme Court rules in admiralty.

WILLEY, CARY & TERRELL,
Proctors for Libellants.
W. A. MOORE,
Proctor for Respondent.

MARCH 30TH, 1871.

Clerk's certificate to complete record.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I hereby certify that the foregoing is truly taken and copied from the record and proceedings of the district court of the United States for the northern district of Ohio.

In testimony whereof I do hereto subscribe my name and affix the seal of said court, at Cleveland, this 10th day of May, A. D. 1871.

[SEAL.]
EARL BILL,
Clerk of said Dist. Court.

Hearing had.

39 And afterward, to wit, at said April term of said circuit court aforesaid, to wit, on the 2nd day of June, A. D. 1871, this cause came on to be heard this day upon the transcript and proceedings in the district court of the United States, within and for the northern district of Ohio, and upon the plea to the jurisdiction of the court filed therein by the said respondent, and the arguments of counsel having been heard thereupon, the cause is taken under advisement by the court.

And afterward, to wit, at said April term of said court, to wit, on the 29th day of June, A. D. 1871, the following final order and decree, rendered by the Honorable H. H. Emmons, circuit judge and one of the judges of this court, was this day received by the clerk of said circuit court, with directions to enter the same upon the journal of said court, to wit:

Final decree.

The circuit court of the United States for the north. dist. of Ohio.

THE NEW ENGLAND MUTUAL INSURANCE COMPANY et al.
vs.
THE DETROIT AND CLEVELAND STEAM NAVIGATION COMPANY.
} Appeal. In admiralty.

This appeal coming on to be heard, on the second day of June, A. D. 1871, at Cleveland, and Messrs. Willey, Cary & Terrell being heard for the appellants, & Messrs. Hibbard & Moore, for the appellees; and the court having taken the cause under advisement, with liberty for counsel within twenty days to hand in briefs; and the cause having been duly considered by the court, it is ordered that the decree of the district court herein dismissing the libel, for want of jurisdiction in said court to entertain the same in manner & form as the same was prosecuted therein, is in all things affirmed with costs to the said appellees.

H. H. EMMONS,
Circuit Judge Sixth Circuit.

And thereupon came the libellants, by Willey, Cary & Terrell, their proctors, and prayed the court to allow an appeal of this cause to
40 the Supreme Court of the United States, which prayer for appeal is in the words and figures following, to wit:

Prayer for appeal.

UNITED STATES OF AMERICA:

Circuit court of the United States for the northern district of Ohio. In admiralty.

NEW ENGLAND MUTUAL INSURANCE COMPANY and others, libellants,
vs.
THE DETROIT & CLEVELAND STEAM NAVIGATION COMPANY, respondents.

The above-named libellants, being all the libellants in said cause, conceiving themselves aggrieved by the final decree entered on the 29th day of June, 1871, in the above-entitled cause, do hereby appeal therefrom to the Supreme Court of the United States, and they pray that this their appeal may be allowed; and that a transcript of the record

and proceedings in the cause, duly authenticated may be sent to the said Supreme Court.

WILLEY, CARY & TERRELL,
Proctors for Libellants.

Allowance of appeal.

And which said appeal is hereby allowed, and bond for said appeal is hereby fixed at the sum of five hundred dollars.

And afterward, to wit, on the 10th day of July, A. D. 1871, came the appellants and filed herein their appeal-bond, which is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, The New England Mutual Insurance Company, The Independent Insurance Company, The Republic Insurance Company, The Equitable Insurance Company, and The Iron-Mountain Mining Company, as principals, and Alexander Stoddart as surety, are held and firmly bound unto The Detroit & Cleveland Steam Navigation Company in the sum of five hundred dollars, to be paid to the said Detroit & Cleveland Steam Navigation Company, its successors, or assigns; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators,
41 jointly and severally, firmly by these presents, dated this 29th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas the above-bounden New England Mutual Insurance Company, Independent Insurance Company, Republic Insurance Company, Equitable Insurance Company, and Iron-Mountain Mining Company, have appealed to the Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, bearing date the 29th day of June, A. D. 1871, in a cause in which the said New England Mutual Insurance Company, Independent Insurance Company, Republic Insurance Company, Equitable Insurance Company, and Iron-Mountain Mining Company were libellants, and the said Detroit & Cleveland Steam-Navigation Company was respondent:

Now, therefore, the condition of this obligation is such, that if the above-named appellants, The New England Mutual Insurance Company, The Independent Insurance Company, The Republic Insurance Company, *The Republic Insurance Company*, The Equitable Insurance Company, and The Iron-Mountain Mining Company shall prosecute their said appeal with effect, and pay all such damages, costs, and expenses as shall be awarded against them as such appellants therein, then this obligation shall be void; otherwise to remain in full force and effect.

THE IRON-MOUNTAIN MINING COMPANY. [SEAL.]
THE NEW ENGLAND MUTUAL INSURANCE COMPANY. [SEAL.]
THE INDEPENDENT INSURANCE COMPANY. [SEAL.]
THE REPUBLIC INSURANCE COMPANY. [SEAL.]
THE EQUITABLE INSURANCE COMPANY. [SEAL.]
By WILLEY & CARY,
Their Att'ys at law & in fact.
42 ALEXANDER STODDART, [SEAL.]
Underwriters' General Agent,
Per JENNINGS & BROOKS, *Ag'ts.* [SEAL.]

And afterward, to wit, at said April term of said circuit court, to wit, on the 10th day of July, A. D. 1871, was made and entered herein the following order, approving the foregoing bond, and for the issuing of a citation, which said order is in the words and figures following, to wit:

Order approving bond & for the issuing of a citation.

This day came the libellants herein, and presented their bond for the appeal of this cause to the Supreme Court of the United States, with Alexander Stoddart as surety, in the penalty of five hundred dollars, conditioned to prosecute their said appeal to effect, and to answer all damages and costs, if they fail to make their appeal good.

Whereupon it is ordered by the court that said bond and surety be approved as good and sufficient, and that said appeal be allowed as heretofore ordered, and that citation be issued according to law.

And afterward, to-wit, on said 10th day of July, A. D. 1871, the following citation was duly issued herein out of said circuit court, which is in the words and figures following, to wit:

Citation.

The United States of America to the Detroit & Cleveland Steam-Navigation Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first day of the next term, being the first day of December next, pursuant to an appeal in the circuit court of the United States of America for the northern district of Ohio, wherein The New England Mutual Insurance Company, The Independent Insurance Company, The
43 Republic Insurance Company, The Equitable Insurance Company, and The Iron-Mountain Mining Company are appellants, and you are appellee, to show cause, if any there be, why the decree passed against the said New England Mutual Insurance Company, The Independent Insurance Company, The Equitable Insurance Company, The Republic Insurance Company, and The Iron-Mountain Mining Company should not be reversed and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 10th day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States of America the ninety-sixth.

[SEAL.] (Signed) C. T. SHERMAN,
District Judge.

And afterward, to wit, on said 10th day of July, A. D. 1871, said citation was duly returned and filed herein in said clerk's office with the following affidavit of service thereon, endorsed in the words and figures following, to wit:

Affidavit of service of citation.

George Willey, esquire, being duly sworn, saith that he served on the appellee, The Detroit and Cleveland Steam-Navigation Company, on the 10th day of July, A. D. 1871, a copy of the appeal filed herein, and also a

copy of the citation issued in this cause & filed with the clerk of the circuit court in and for the northern district of Ohio, on said 10th day of July, by leaving said copy of the citation and said copy of the appeal for said appellee, in the clerk's office of the circuit court aforesaid, and by mailing a copy of said citation and a copy of said appeal to said appellees.

GEO. WILLEY.

Sworn to before me this 10th day of July, A. D. 1871.

CHA'S H. BILL,
U. S. Com'r.

44 THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss :

I hereby certify that the foregoing is truly taken and copied from the record and proceedings had at the April term, A. D. 1871, of the circuit court of the United States, within and for the sixth circuit and northern district of Ohio.

Witness my official signature and the seal of said court, at Cleveland, in said district, this 12th day of July, A. D. 1871.

[SEAL.]

EARL BILL,
Clerk of said Circuit Court.

45 The United States of America to The Detroit and Cleveland Steam Navigation Company :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first day of the next term, being the 1st Monday of December next, pursuant to an appeal in the circuit court of the United States of America for the northern district of Ohio, wherein The New England Mutual Insurance Company, The Independent Insurance Company, The Republic Insurance Company, The Equitable Insurance Company, and The Iron-Mountain Mining Company are appellants, and you are appellee, to show cause, if any there be, why the decree passed against the said New England Mutual Insurance Company, The Independent Insurance Company, The Equitable Insurance Company, The Republic Insurance Company, and The Iron-Mountain Mining Company should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 10th day of July, in the year of our
46 Lord one thousand eight hundred and seventy-one, and of the Independence of the United States of America the ninety-sixth.

{ SEAL OF THE CIRCUIT COURT. }

C. T. SHERMAN,
District Judge.

Circuit court of the United States, northern district of Ohio, ss.

It is hereby certified that the foregoing is a true copy of the original citation issued in the cause named therein by the circuit court aforesaid.

Witness my official signature and the seal of said court, at Cleveland, Ohio, this 10th day of July, A. D. 1871.

[SEAL.]

EARL BILL,
Clerk of said Court.

(Indorsed:) The New England Mutual Insurance Company et al. vs. The Detroit & Cleveland Steam Navigation Co. Citation on appeal to Supreme Court of the United States. Filed July 10th, 1871. Earl Bill, clerk. (Copy.)

47 UNITED STATES OF AMERICA:

Circuit court of the United States for the northern district of Ohio, in admiralty.

THE NEW ENGLAND MUTUAL INSURANCE COMPANY and others, libellants,
vs.
THE DETROIT & CLEVELAND STEAM NAVIGATION Company, respondents.

The above-named libellants, being all the libellants in said cause, conceiving themselves aggrieved by the final decree entered on the 27th day of June, 1871, in the above-entitled cause, do hereby appeal therefrom to the Supreme Court of the United States; and they pray that this their appeal may be allowed, & that a transcript of the record & proceedings in the cause, duly authenticated, may be sent to the said Supreme Court.

WILLEY, CARY & TERRELL,
Proctors for Libellants.

DETROIT, *July* 12, 1871.

Rec'd, from proctors for libellants, a copy of the above appeal, & of the citation hereto attached.

W. A. MOORE,
Proctor for Respondents.

48 Circuit court of the United States, northern district of Ohio, ss.

It is hereby certified that the foregoing is a true copy of the original appeal filed in the within-entitled cause, and now remaining in the clerk's office of said circuit court.

Witness my official signature and the seal of said court, at Cleveland, Ohio, this 10th day of July, A. D. 1871.

[SEAL.]

EARL BILL,
Clerk of said Court.

(Indorsed:) 2248. In U. S. circuit c't, in admiralty. New England Mutual Insurance Company & others, libellants, vs. The Detroit & Cleveland Steam Navigation Company. Appeal. Filed June 29, 1871. Earl Bill, clerk. (Copy.) Returned & filed July 17th, 1871. Earl Bill, clerk. Willey, Cary & Terrill, proctors for libellants.

49 The United States of America to The Detroit and Cleveland Steam Navigation Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first day of the next term, being the first Monday of December next, pursuant to an appeal in the circuit court of the United States of America for the northern district of Ohio, wherein The New England Mutual Insurance Company, The Independent Insurance Company, The Republic

Insurance Company, The Equitable Insurance Company, and The Iron-Mountain Mining Company are appellants, and you are appellee, to show cause, if any there be, why the decree passed against the said New England Mutual Insurance Company, The Independent Insurance Company, The Equitable Insurance Company, The Republic Insurance Company, and The Iron-Mountain Company should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 10th day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of the
50 Independence of the United States of America the ninety-sixth.

[SEAL] C. T. SHERMAN,
District Judge.

George Willey, esquire, being duly sworn, saith that he served on the appellee, The Detroit and Cleveland Steam Navigation Company, on the 10th day of July, A. D. 1871, a copy of the appeal filed herein, and also a copy of the citation issued in this cause, & filed with the clerk of the circuit court in and for the northern district of Ohio, on said 10th day of July, by leaving said copy of the citation, and said copy of the appeal for said appellee in the clerk's office of the circuit court aforesaid, and by mailing a copy of said citation and a copy of said appeal to said appellees.

GEO. WILLEY.

Sworn to before me this 10th day of July, A. D. 1871.

CHA'S H. BILL,
U. S. Com'r.

(Indorsed:) 2248. The New England Mutual Insurance Company et al. vs. The Detroit and Cleveland Steam Navigation Co. Citation on appeal to Supreme Court of the United States. Filed July 10th, 1871. Earl Bill, clerk.

(Indorsement on cover:) No. 527. The New England Mutual Insurance Company, The Independent Insurance Company, The Republic Insurance Company, The Equitable Insurance Company, The Iron-Mountain Mining Company, appellants, vs. The Detroit and Cleveland Steam Navigation Company. N. Ohio C. C. U. S. Filed 11th December, 1871.

SUPREME COURT OF THE UNITED STAT

JOSHUA ATKINS, ET AL., Appellants,

vs.

THE FIBRE DISINTEGRATING COMPANY, Appellee.

BRIEF FOR APPELLANTS IN 27

BY WILLEY, CARY & TERRELL, CLEVELAND, O.

Supreme Court of the United States.

JOSHUA ATKINS, ET AL., Appellants,

vs.

THE FIBRE DISINTEGRATING COMPANY, Appellee.

BRIEF FOR APPELLANTS IN 279.

BY WILLEY, CARY & TERRELL, CLEVELAND, O.

By an order of this Court, at its December Term, 1872, it was permitted to Counsel in 279, to file briefs upon the question at issue in this case.

Under the leave thus granted, we respectfully submit, on behalf of the Appellants in 279, the following brief.

The question for decision here is, whether the clause of the 11th Section of the Judiciary Act of 1879, which reads "*and no civil suit shall be brought before either of said Courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ,*" applies to causes of Admiralty. In support of the position that it does not so ap-

ply, we respectfully submit the following considerations and authorities:

FIRST.—The proceeding by attachment against an absent, absconding, or non-resident Defendant, is one inherent in the Courts of Admiralty, and exercised and employed by them from the earliest times.

Clerke's Praxis, Chap. 24. "*If the Defendant is out of the Kingdom, or so absconds that he cannot be arrested, then if he has any goods, wares, ships, or parts of a ship or vessel, upon the sea or within the flux or reflux of the sea, a warrant is to be taken out to these effects.*

Ibid, Clause 28. "*Sometimes the person to whom you have lent money, or who is indebted to you upon some maritime contract, cannot be met with to be arrested, or has no goods that the Marshal can come at, but you know where, and in whose possession your debtors goods are, or at least some person who owes your debtor money; in that case you may sue out a warrant to the effect of the one specified in the 24th chapter.*"

Bouyson & Holmes, vs. Miller & Riley,

Bee's Admiralty Reports, p. 186.

The Syllabus of this case reads: "*Attachments may issue out of the Admiralty Courts of the United States, against the goods or debts of an absent person, so as to make him a party to the suit.*"

Manro vs. Almeida, 10 Wheaton, 473.

In this case held, that the proceeding by attachment inheres in the Courts of Admiralty, coming from the civil law, and that during the three years that our States were referred to the civil law, for their "*forms and modes of proceeding*" this process was fully legalized.

SECOND.—The act of September 29th, 1789, (1. Stat. 93,) provided among other things that the "*forms and modes of proceeding,*" in cases of Admiralty and maritime jurisdiction, should be *according to the course of the civil law,* thereby adopting the process of attachment.

It must be borne in mind that this act, adopting the modes of of proceeding known to the civil law, was passed by Congress only five days after the passage of the Judiciary act, and was before the same committee, and under discussion at the same time, with that act.

It cannot, therefore, be supposed that Congress would thus have authorized this proceeding by attachment, which is one of the most important of the modes of the civil law, if they had intended that the clause of the Judiciary act referred to should apply to causes in admiralty.

THIRD.—The Act of May 8th, 1792, (1. Stat. 275,) provides that in courts of Admiralty and Maritime jurisdiction, the process shall be according to the principles, rules and usages of Courts of Admiralty; and the Admiralty practice there alluded to, is held in *Manro, vs. Almeida,* above referred to, to include the process of attachment.

Indeed, the Supreme Court of the United States, in the case of *Insurance Company, vs. Dunham,* 11th Wallace, 1, have decided that the Admiralty and Maritime jurisdiction of the United States, is co-extensive with that of analogous jurisdiction in other countries, constituting the maritime, commercial world. That the process of attachment inheres in the general Admiralty law, we have already shown.

FOURTH.—The language of the first clause of the 11th section of the Judiciary act, would seem of itself to indicate that the Section as a whole refers only to suits at common law and in equity. It reads: "*The Circuit Courts shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature, at common law or in equity, &c.*"

FIFTH.—A close inspection of the Judiciary act, alone, will disclose that the clause in question does not apply to causes in Admiralty.

It will be seen that the 9th Section has for its object the prescribing of the jurisdiction of the *District* Court of the United States, and that no clause like the one under consideration, appears therein. And next, that the 11th Section has for its object the prescribing of the jurisdiction of the *Circuit* Courts of the United States, confining it to cases at common law and in equity, of a civil nature, and to certain crimes and offences.

And finally, that the mention of the District Courts in said 11th Section, is merely incidental, growing out of the fact that the District Courts have concurrent jurisdiction with the Circuit Courts, of certain cases therein named; and had it not been for

this mere incidental mention of the District Courts, in connection with these cases of concurrent jurisdiction, there would not have been the slightest ground for claiming that the clause in question had any reference to causes of Admiralty and Maritime jurisdiction.

In other words, the primary and main object of the 11th Section was to prescribe the jurisdiction of the *Circuit* Courts of the United States, that of the *District* Courts having already been prescribed in the 9th section; and the clause in question applies only to the cases in special reference to which the 11th Section was enacted, viz: civil suits at law and in equity, of which the Circuit Courts have jurisdiction, under said Section, and such other suits as are within the concurrent jurisdiction of the Circuit and District Courts under said Section.

SIXTH.—As a general rule, when causes of Admiralty and Maritime jurisdiction are referred to in the Statutes, they are in some way specially designated, and the absence of such special designation, in the clause in question, indicates that they were not intended to be included therein.

Vide. Judiciary Act, Sections 21 and 22.

Section 21 provides for appeals in "causes of Admiralty and Maritime jurisdiction." Section 22 provides that final decrees and judgments in "*civil actions,*" may be reviewed in error, &c.

Confessedly, the phrase "*civil actions,*" in Section 22, is as broad as the phrase "*civil suit,*" which occurs in the clause in question, in the 11th Section; and yet it will not be contended that this phrase, in the 22d Section, has any reference to causes in Admiralty.

The meaning which Congress attached to the phrase, "civil suit," or "civil action," having been definitely ascertained, by reference to the 22d Section of this Act, a well known rule of construction requires that wherever else in the same act, the same, or substantially the same phrase occurs, it shall receive a like interpretation settles the meaning of this phrase in the 11th Section, unless there is some controling reason which demands a different construction. Upon the same point, *Vide.* Act of September 29th, 1789, (1. Stat. 93.) and Act of August 21st, 1862. (12. Stat. 558.)

SEVENTH.—The Act of February 28th, 1839, (5. Stat. 321.) which was passed for the purpose of remedying certain difficulties in practice, to which the 11th Section of the Judiciary act gave rise, is made applicable only to suits at law or in equity, although the same difficulties would arise in Admiralty proceedings, if said proceedings are held to be within the provisions of the said 11th Section.

EIGHTH.—If causes in Admiralty are to be considered as referred to whenever the words "*suit*" "*civil suit*," or "*civil action*," are used in the statutes of the United States, the results would be disastrous.

For instance: Take the Act of May 14th, 1858, (11. Stat. 272.) By this Act *residence* is made the test of jurisdiction. If the word "suit" in this Act covers causes of Admiralty and Maritime jurisdiction, the well known proceeding *in rem* against the ship, and *in personam* against the Master or Owner, under the same libel and process, would be substantially destroyed, as it seldom happens that the ship is found where the Master or Owner resides.

Take the important Admiralty proceeding to obtain the possession of a ship, which is a proceeding *in personam;* if the 11th Section of the Judiciary Act applies to causes in Admiralty, what shall be done when the residence of the Defendant is in one district, and the ship to be seized and delivered is in another?

We are in doubt whether a careful and most extended search through all the nomenclature of the books—statutes, reports and elementary works—would disclose that the word "*suit*" had ever been applied to a cause in Admiralty. Certain we are, that the phrase, "*causes in Admiralty*," is as distinct and well defined as the phrase "*suits at law or in equity.*"

We have thus far discussed this question, purely upon the construction of this statute. Whatever may be the conclusion of the Court, upon this question of interpretation, there are other considerations, which, in our judgment, are equally effective, in our favor.

Upon the the second branch of the inquiry we submit:

If the clause of the 11th section, now under consideration, originally applied to causes in Admiralty, it was by neces-

sary implication repealed by the act of August 23d, 1842 (5. Stat. 517.) which gave to to the Supreme Court of the United States full power to prescribe, regulate and alter forms of writs, and other process, to be used in the Circuit and District Courts of the United States, and generally to regulate the whole practice of said Courts, and by the promulgation thereunder in 1845, of the 2nd Rule in Admiralty by the Supreme Court.

This 2nd rule provides that where the Respondent cannot be found within the district, process of attachment may issue against his property, &c. It clearly authorizes the proceedings instituted in this case.

It is to be remarked that this Rule was adopted after the practice in Admiralty had been defined, in the case of *Manro vs. Almeida*, already referred to, and just after the important decision of Judge Story in the case of *Clark vs. The New Jersey Steam Navigation Co.* 1. Story 531 had been rendered, and was thus an adoption by the Supreme Court of the doctrines laid down by Judge Story in that case. Indeed it is more than probable, that Judge Story himself drafted the Rule; basing it upon the decision referred to. We regard the Rule, coming at the time it did, as a virtual decision by the Supreme Court, either:

1st. That the clause of the 11th section of the Judiciary act in question, never had any application to causes in Admiralty, or,

2nd. That this Rule, promulgated under the authority of the Act of 1842, would operate as a repeal of the clause in question, as far as regards causes in Admiralty.

That a rule of the Supreme Court, adopted under the authority of the act of 1842, may operate as a repeal of a prior act; *Vide Gaines vs. Traviss.* Abbot's Rep. 422. The 4th head of the syllabus of the above case reads, "*The act of Congress of August 23d, 1842, (4. U. S. Stat. 518, Sec. 6.) conferring upon the Supreme Court power to regulate the practice of the Circuit and District Courts, taken in connection with the rules promulgated by the Supreme Court under that act in 1845, operates as a suspension of the acts of Congress of 1839 and 1841, abolishing imprisonment for debts on process issuing out of the United States' Courts in all cases where, by the local law, it would be abolished.*"

The Supreme Court, in effect, confirmed this decision by subsequently amending its Rules.

Again in Admiralty Rule No. 37, the Supreme Court recognizes the validity of the process by attachment.

To the foregoing considerations we subjoin the following authorities:

Bouysson & Holmes vs. Miller & Ryley. Bee's. Ad. Rep. 186.

Mauro vs. Almeida. 10. Wheaton 473.

The Invincible. 2. Gallison 29.

Clark vs. N. J. Steam Nav. Co. 1. Story 531.

Boyd vs. Urquhart et al. Sprague's Rep. 423.

N. J. Steam Nav. Co. vs. Merchants' Bank. 6. Howard. 344.

Cushing et al. vs. Laird Jr. 3. Amn. Law Times Rep. 50.

Barnes et al. vs. Steamship Co. Legal Intelligencer, June 19, 1868. Grier, Judge.

Manchester, Hopkins & Co. vs. Hotchkiss. Int. Rev. Record. April 22, 1871.

2nd Parson's Shipping and Ad. p. 491.

Benedict's Admiralty. 2nd Edition. Sec. 425, et seq. p. 251.

Smith vs. Miler. Abbott's Ad. Rep. 373.

The cases of Cushing *vs.* Laird Jr., and Smith *vs.* Miler are so full and exhaustive, in their discussion of this question, that it is impossible to abridge them, and we ask the court to give them a reading.

FINALLY. If this libel is dismissed, it should not be with costs, as the 2d Rule in Admiralty clearly authorized this proceeding.

WILLEY, CARY & TERRELL.

Supreme Court of the United States.

THE NEW ENGLAND MUTUAL INSURANCE COMPANY, and others, *Appellants*,
vs.
THE DETROIT AND CLEVELAND STEAM NAVIGATION COMPANY, *Respondent*.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

BRIEF ON THE PART OF THE RESPONDENT.

GEORGE B. HIBBARD, *for Respondent, Buffalo, N. Y.*

The point contended for in this brief is this:

That a District Court of the United States, cannot, without voluntary general appearance, by the respondent, obtain jurisdiction of a suit in admiralty, *in personam*, brought against a corporation created by some State or power not within the District where the action is brought; and that, as it cannot obtain such jurisdiction of the action, it has no power to issue or make effectual any attachment or other process in the action.

The case upon which this question arises is as follows:

In November, 1869, The New England Mutual Insurance Company and others, libellants and the appellants in this case, filed their libel in the United States District Court for the Northern District of Ohio, against

the Detroit and Cleveland Steam Navigation Company, respondents, seeking to recover about twenty-five thousand dollars, for damages alleged to have been sustained by the libellants, by reason of a collision between the barque Courtland and the steamer Morning Star. The libel alleged that the respondent was a corporation, created and existing under and by virtue of the laws of the State of Michigan (*Record, fol.* 5), and of course foreign to the Northern District of Ohio. The libel alleged what was wholly immaterial, that the respondent had personal property, to wit, the steamer R. N. Rice (a steamer having nothing to do with the collision), and other personal property in the District (*fol.* 11), and prayed that attachment might issue against the R. N. Rice, etc., "to enforce the appearance of the respondent" to answer the matters alleged in the libel, etc. (*Fol.* 11.)

Upon the prayer of this libel the Court issued its warrant of "arrest and attachment" in the case, commanding the Marshal to *arrest* the defendant, a corporation, and that if the respondent could not be found in the District, then to attach the goods, etc., of the respondent, etc. (*Fols.* 15, 16.) To this writ the Marshal returned that he failed to find the respondent in his District, and had attached the steamer R. N. Rice. (*Fol.* 16.)

The respondent did not appear generally in the action. A stipulation was filed for the purpose of procuring a dissolution of the attachment, etc. (*fol.* 18), and the respondent plead specially to the jurisdiction of the Court, basing its answer upon the point contended for in this brief; that it was not an "*inhabitant*" of the District and could not be "*found*" therein. (*Fols.* 19, 20.)

A libel was filed *in personam* in the same Court by the respondents in the first case against the libellants in the first case; and monition was issued upon the prayer of that libel, to which the Marshal made return that he could not find the libellants in the first case. (*Fols.* 27–34.) It does not appear from the record that anything further was done in this case so commenced by the respondent in the first case; and the proceedings in the last case really form no part of the record in this.

Upon express stipulations that the filing of answer in the first case, and the taking of testimony therein, etc. (stipulations probably made, so that should the plea to the jurisdiction of the Court not be sustained, testimony might be taken and not lost to the parties), should not prejudice the plea to the jurisdiction, or be a waiver of the respondent's rights under that plea, and that the respondent should have the same rights, etc. (*fols.* 35, 36), an answer was put in to the libel in the first case, and testimony was taken in the case.

The question as to the jurisdiction of the District Court came on for argument at Cleveland, Ohio, in March, 1871; and the plea to the jurisdiction was sustained, the District Court deciding that it had no jurisdiction of the cause (*fol.* 37), and dismissing the libel in the cause on that ground.

From this decree the libellants appealed to the Circuit Court of the District. The Circuit Court affirmed the decree of the District Court (*fol.* 39), and from the decree of the Circuit Court the libellants have appealed to this Court.

The single question presented here, therefore, is: Had the District Court jurisdiction of the cause?

POINT FIRST.

For the purpose of enabling the question clearly to be understood, it is necessary that the statutory and other direct sources of the claimed jurisdiction should be considered; and for that purpose, the first point made by the respondent is, that by the Constitution, Judiciary Act, Process Acts, and Rules of the Supreme Court, it is apparent that the District Court was without jurisdiction of the cause.

I. The constitution provides that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction."

Constitution, Art. 3, § 2.

The judiciary act provides that the Circuit Courts shall have jurisdiction of the various civil cases over which it exercises original and appellate jurisdiction.

1 *Stat. at Large* (*L. & B. ed.*), 78.
1 *Brightly's Digest*, 126.

It also provides that the District Courts shall have "exclusive original cognizance of all *civil* causes of admiralty and maritime jurisdiction," among the other cases of which it has original cognizance; and that the "trial of issues of fact in the District Court in all causes except *civil* causes

of admiralty and maritime jurisdiction, shall be by jury."

1 *Stat. at Large*, 76, 77.
1 *Brightly's Digest*, 230.

The judiciary act was passed in 1789. The process act of 1792 provides that the forms of writs, etc., and the forms and *modes of proceeding* in suits at common law shall be same as now used in said courts, in pursuance of the act of September 29, 1789, superseded as hereinafter appears, and the "proceedings in cases of admiralty and maritime "jurisdiction shall be according to the principles, "rules and usages which belong to courts of admi- "ralty as contradistinguished from courts of law, "*except so far as may have been provided for by* "*the act to establish the judicial courts of the United* "*States*," subject, however, to such additions as the courts shall deem expedient, or to such regulations as the Supreme Court shall think proper, from time to time, to prescribe to any Circuit or District Court.

1 *Stat. at Large*, 276.
1 *Brightly's Digest*, 793.

By act "supplementary" to the judiciary act, but still in its nature a "process act," in 1842, it was provided that the Supreme Court should have power and authority, from time to time, to prescribe, regulate and alter the writs and process to be used and issued in the District and Circuit Courts, and the forms and modes of framing and filing libels and other proceedings, and generally

the forms and modes of proceeding to obtain relief in such courts.

5 *Stat. at Large*, 518.
1 *Brightly's Digest*, 793.

Under the power given by these acts, the second rule of the Supreme Court, in Admiralty, provides that in suits *in personam* the mesne process may be "*by warrant of arrest of the person* "*of the defendant, with a clause therein that if he* "*cannot be found to attach his goods and chattels*," etc., or by a simple monition in the nature of a summons, to appear and answer.

Rule 2, in Admiralty, Sup. Court.

NOTE.—Nor is there anything in the act of September 29, 1789, which affects the question.

1 *Stat. at L.*, 93.

That act provides that "until further provision shall be made," and *except where by that act or other statutes of the United States it is otherwise provided*, forms of writs and modes of process in common law cases should be the same as those used in the Supreme Courts of the States respectively: and it is plain, notwithstanding the punctuation, and especially as all comes beneath the same words which declare the whole section to be enacted, that in strictness of the language, and in actual sense, the clause following the provision as to common law process is to be taken conjunctively with the clause as to common law process, for certainly the language as to proceedings in Courts of Equity and Admiralty are to be considered as restricted by the provision, that such proceedings should not be contrary to a provision of an act of Congress, "and the forms and proceedings in causes of equity "and of admiralty, and maritime jurisdiction shall be according to the course of "the civil law." As the judiciary act expressly provides that the court shall not have jurisdiction of the cause (*Post III*, 3), therefore, it is provided by statute otherwise, than that in this case, attachment should issue, and the act of September 29, 1789, has no application to the case.

And above all, the act of September 29, 1789, was a mere temporary act only to be operative "until further provision should be made."

1 *Stat. at L.*, 93.

(The act, for the reason that it was but temporary, is not contained in the body of Brightly's Digest.)

See 1 *Brightly*, 793, *and note b.*

And such further provisions were made by the subsequent process acts, in which provision as to process is made subordinate to the provisions of the judiciary act of 1789.

1 *Stat. at L.*, 276.
5 *Stat. at L.*, 518.
1 *Brightly's Digest*, 793.

It is quite apparent, therefore, that nothing can be claimed under the act of September 29, 1789, to sustain the jurisdiction.

II. Under the acts and rules applicable to the the question, it is contended that, by the very terms of these powers, the arrest of the defendant could not have been had, and that therefore this attachment was not good.

The rule is the result of the process acts of 1792 and 1842. By the terms of that rule, an attachment only can issue with process which would have authorized the *arrest* of the defendant. Such process for arrest should not have issued in this case, for the libel alleges that the defendant was a foreign corporation, and therefore, of legal necessity, beyond the power of the court.

III. All the powers granted by the constitution, and the various acts, can have full exercise; yet, under the limitations of the judiciary act, the District Court had no jurisdiction of this cause.

1. That limitation applies to and governs the process acts.

a. The process act of 1792 provides that proceedings in Admiralty shall be such as belong to Admiralty Courts, *except so far as those proceedings are provided for by the judiciary act.*

1 *Stat. at Large*, 276.
1 *Brightly's Digest*, 793.

b. It is only necessary to refer to two of the various decisions establishing that the process acts do not extend the jurisdiction of the Federal Courts, but are subject to the provisions of the

judiciary act, to show that it is impossible to look to the process acts for the sources of jurisdiction.

Chaffee vs. Hayward, 20 *How.*, 208, 215.
Toland vs. Sprague, 12 *Peters*, 300, 327, 328.

2. The limitation of the judiciary act also of necessity applies to and governs the Rules, for those Rules only have their force under the process acts.

Wilson vs. Pierce, 5 *M. Law R.* (*N.S.*), 146.

3. That limitation is found in the judiciary act, the source of the powers of the Federal Courts; and, therefore, is a necessary limitation on those powers. That act, in its eleventh section (and it is repeated here for the purposes of verbal criticism, and for the convenience of exact legal definition), provides that "no person shall be arrested "in one district for trial in another district, in any "*civil action* before a Circuit or District Court, and "*no civil suit shall be brought before either of said* "*courts, against an inhabitant of the United States,* "*by any original process in any other district than* "*that whereof he is an inhabitant, or in which he* "*shall be found at the time of serving the writ.*"

1 *Stat. at Large*, 78, 79.
1 *Brightly's Digest*, 127.

4. It is claimed upon the part of the respondent, that this is a "*civil suit*" brought against an "*inhabitant of the United States by original process*" in a district of which it was not an *inhabitant*,"

and in which it "*could not be found*," and that therefore the District Court had no jurisdiction *of the suit*, and that, as it had no jurisdiction of the suit, it had no power to issue or proceed on the attachment, for it could only thus proceed in a suit of which it had jurisdiction. If the action falls, all its auxiliary process falls with it.

5. This action is a "*civil suit*" within the meaning of the section.

a. It is named and called a *civil* suit in the judiciary act.

1 *Stat. at Large*, 77, § 9.

b. It is a civil suit as settled upon authority.

3 *Blackstone's Com.*, 106, 116.
1 *Spence's Eq. Juris.*, 212.
Benedict's Admiralty, §§ 189, 400.
2 *Brown, Civ. and Ad. L.*, 457.
Wilson vs. Pierce, 5 *M. L. Rep.*, 143.
Exparte Graham, 3 *Wash. C. C. R.*, 456, 462.

In this last case the language is used as to a question arising under this very act, that "prize proceedings against an inhabitant of the United States is unquestionably a civil suit."

Jennings vs. Carson's Exrs., 1 *Peter's Ad. Dec.*, 9, 10.
The U. S. vs. La Vengeance, 3 *Dallas*, 297.

This last case was that of a libel filed against a vessel for illegally acting as a privateer, and the

Court upon a question of jurisdiction say, "we are unanimously of the opinion that this is a civil cause."

The U. S. vs. The Missouri, 11 *Int. Rec.*, 5.
The N. Y. Steam Nav. Co. vs. Merchant's B., 6 *How.*, 387.
Manro vs. Almeida, 10 *Wheat.*, 473, 494.

6. The defendant is an inhabitant of the United States, and of the State of Michigan, and of legal necessity, not an "inhabitant" of the Northern District of Ohio.

a. A corporation is a "person" within the meaning of the act.

The U. S. vs. Amedy, 11 *Wheat.*, 392, 412.
Beaston vs. Farmers' Bank, 12 *Peters*, 102, 134.

b. This corporation was an "inhabitant" of the State of New York, and not of Illinois.

Johnson's Dic. "*Inhabitant.*"
Webster's Dic. "*Inhabitant.*"
Burrill's L. Dic. "*Inhabitant.*"
Jacob's L. Dic. "*Inhabitant.*"
2 *Kent's Com.*, 430, 431, *note.*
Roosevelt vs. Kellogg, 20 *Johnson's R.*, 208, 210.
In the matter of Wrigley, 8 *Wendell*, 140, 141.
Harvard College vs. Gore, 5 *Pick.*, 379.

These authorities determine, that the root of the word, its definition as given by legal and other lexicographers, general decision and express adjudication upon questions turning upon the meaning of the word, all concur to fix the word as meaning "one who has a permanent and fixed dwelling and residence in a place."

The Hope Ins. Co. vs. Boardman, 5 *Cranch*, 517.
Louisville C. C. R. R. vs. Letson, 2 *How.*, 497.
Marshall vs. The B. & O. R. Co., 16 *How.*, 314, 328.
Covington D. Co. vs. Shepherd, 20 *How.*, 227, 233.
The O. & M. R. R. Co. vs. Wheeler, 1 *Black.*, 286.

These important cases are referred to, not to discuss anew the great question as to the character beneath the constitution and the judiciary act, of that artificial entity, a corporation; but to say, that, when it has been held that the broad language of 2 *Howard*, that corporations were, in this view, citizens, was too general, for the reason that they cannot have that civic character, (as was virtually considered in 16 *Howard*, 20 *Howard*, and other cases,) and when it is held as the result of all the cases on the subject, that the legal entity can be looked through until its substantial part, the corporators, are visible; but that in the language of Chief Justice Taney, in 20 *Howard*, the members of the corporate body must be presumed to be citizens of the State in which the corporation

is domiciled, and that all parties are estopped from denying that fact," it is determined by perhaps the most weighty line of decisions which can in any case be referred to, that the substantial part of a corporation, within the meaning of the constitution and the judiciary act, has a residence, an inhabitancy, which all parties are estopped from denying, and that that place of residence and inhabitance is within the sovereignty creating the corporation, and can be in no other place. The legal habitation of the corporation is thus undeniably fixed, for the inhabitancy of all the component parts of the corporation is undeniably fixed. That legal habitation is within the State creating the corporation, "which," says Mr. Justice Grier (in 16 *Howard*), "is the necessary *habitat* of the corporation, and where it alone can be sued."

Bank of U. S. vs. Devaux, 5 *Cranch*, 88, 89.

In this case a corporation is recognized upon leading English authorities to be an "inhabitant" of the place where it is legally located.

Flanders vs. The Ætna Insurance Co., 3 *Mason*, 158.

In this case it was held that a corporation of Connecticut could not be an inhabitant of another District. The question arose as to the application of the 11th section of the judiciary act, and the Court decided that, had there been no general appearance in the case, the section referred to would have prevented the Court from having jurisdiction.

"The process of the common law," says Justice Story in Clarke v. the N. J. S. Co. / Story 538 this last case, "could not reach foreign corporations, for the plain reason that they were not *inhabitants* of, and had not any corporate existence within the realm."

7. The respondent "*could not be found*" in the Northern District of Ohio.

a. This phrase, doubtless, must mean: could not be found for the purpose of efficient service of process to give the Court jurisdiction of the person of the defendant. The language is only employed in that view, and can only have that application. It does not mean that the corporation could not be ascertained to be exercising some of its functions in the District through some agency. It means that, to enable jurisdiction to be obtained, the corporation must be found in the sense which permits the arrest—the actual, manual caption by the Marshal, of a natural person. The very rule of the Supreme Court only permits the attachment clause to form a portion of process commanding the "*arrest of the person of the defendant.*"

2 *Rules in Admiralty.*

b. The respondent could not be "found" for the purposes of such service.

Bank of Augusta vs. Earle, 13 *Peters*, 519, 588.

"It is very true," says Chief Justice Taney in this case, "that a corporation can have no *legal* "*existence* out of the boundaries of the sovereignty

"by which it was created. It exists only in con-
"templation of law, and where that law ceases to
"operate and is no longer obligatory, the corpora-
"tion can have no existence. It must dwell in the
"place of its creation, and cannot migrate to an-
"other sovereignty."

McQueen vs. The Middlesex M. Co., 16 *Johnson*, 5, 6.

"Process against a corporation," says Justice Spencer in this case, "must be served on its head "or principal officer within the jurisdiction of the "sovereignty where this artificial body exists. If "the president of a bank of another State were to "come within this State, he could not represent "the corporation here; his functions and his char-"acter would not accompany him when he moved "beyond the jurisdiction of the government under "whose laws he derived this character."

In *Peckham vs. The N. P. in H.*, 16 *Pick.*, 286, the Supreme Court of Massachusetts affirms this doctrine in so many words, and say, "we hold that "all foreign corporations are without the jurisdic-"tion of this commonwealth."

Day vs. The N. J. R. M. Co., 1 *Blatchford C. C. R.*, 628, 633.

This was a case arising under the patent laws in the Circuit Court for the Southern District of New York. It will be more particularly referred to in another connection, for the precise question there arose, under the 11th section of the judiciary act, whether the Court could obtain jurisdiction (if no general appearance was entered) of the defendant,

a New Jersey corporation. It is only now referred to as an express authority that the defendant cannot be found in any State other than that in which it is incorporated; for, say the Court: "We are "satisfied that neither levying an attachment on "the goods of the defendant, nor the service of "summons upon their president within it, nor both "together, can have the effect to give jurisdiction "over the defendant."

In *Sayles vs. The N. W. Ins. Co.*, 2 *Curtis*, 212, Justice Curtis says, in a case arising under this same section of the judiciary act: "The defend- "ant, which is a foreign corporation, was not and "could not be found in the District."

8. It is thus established that the defendant was an "inhabitant" of the United States and of the State of Michigan, and was not an "inhabitant" of the Northern District of Ohio; that it could have no legal existence in that District as an entity (though, of course, like all corporations, it might exercise some powers there); and that therefore, of legal necessity, it could not be "found" where it did not exist.

9. The process, that is to say, the monition and attachment by which it was attempted to commence this suit, was "original process." "Original process" (as contradistinguished from "original writ") is the means of requiring or compelling the defendant to appear in Court.

3 *Blackstone's Com.*, 279.
Jacob's L. Dic., Title, Process.
Wilson vs. Pierce, 5 *M. L. Rep.* (*N. S.*), 141.

10. This case, therefore, precisely defined, comes within the exact meaning of all parts and phrases of the 11th section of the judiciary act. It will be seen hereafter that it equally comes within the spirit and object of that section. It would seem that this exact understanding of the section and of the case, would be sufficient to determine this case.

POINT SECOND.

Upon authority and upon principle, it is apparent that the eleventh section of the judiciary act, applies to the case, and the court had no jurisdiction of this action.

1. It must be borne in mind, that the point of the respondent is, that the District Court had no jurisdiction *of this suit*, and therefore could not issue an attachment, or render a decree, or do any other act in the suit. The respondent does not deny but that in a case, and in an admiralty case *in personam*, of which the court had jurisdiction, an attachment might issue. Nor does the respondent deny but that in a case over which the court has jurisdiction, the court may exercise power, over property within its district. The question is simply one of *jurisdiction over the cause.*

2. Nor does the respondent contend but that after voluntary appearance on the part of the defendant, the court might have jurisdiction. Nearly all the authorities cited hereinafter, show that the court might, on such voluntary appearance, exer-

cise jurisdiction. But the respondent does contend, that if a *voluntary appearance* is necessary to confer jurisdiction in such cases, as is decided in

Flanders vs. The E. Ins. Co., 3 *Mason*, 158,
Picquet vs. Swan, 5 *Mason*, 35,
Toland vs. Sprague, 12 *Peters*, 300,
Sayles vs. The N. W. Ins. Co., 2 *Curtiss*, 211,

the court certainly can have no jurisdiction to *compel* an appearance, which is the theory under which attachments in such cases sometimes issue.

There was, of course, no voluntary appearance in the case. Had the answer been put in, and testimony been taken, without any stipulation in the case, that, probably, would have conferred jurisdiction, for it would have been a waiver of the question of jurisdiction, a personal privilege which the respondent had a right to waive. But here it was stipulated that no such waiver should be made, and that the question of jurisdiction should remain unaffected by steps, probably taken for the meritorious purpose of preserving testimony which might otherwise be lost. (*Fols.* 35, 36.) Of course such stipulations prevent any claim (should such claim be made), that such steps were a waiver of the question of jurisdiction, from having any effect.

The filing of the libel by the respondent against the libellants, in the first case, has nothing to do with the question. That was altogether an independent suit. A cross libel is in no sense, although called a cross libel, a part of the original suit. It often, is between different parties; and indeed, it would be at least difficult to see how this cross

libel could be sustained to the extent of obtaining decree against some of the respondents in it—the insurance companies. The 53d Rule of this court (the 52d since revision of the Rules in 1870), in admiralty, does not regard a cross libel as part of the original suit. It merely provides that the court may, in its discretion, require a libellant in the original case, to give security, to answer the demands of a cross libel. But the cross libel is, nevertheless, an altogether independent proceeding in an independent suit.

The Steamer Bristol, 4 *Benedict Dist. C. R.*, 55, 57.

Of course the libellant, in the libel filed by the respondents in the first case, had the right to come into the court and file an independent libel, without giving jurisdiction in another cause.

It does not appear that anything was ever really done under the libel last filed, and it really forms no part of the record in this case. It is not the appearance alone, and as such, that waives the question of jurisdiction, however. Mere appearance, as such, could not have that effect, in the nature of things. To constitute the waiver, the appearance must be *voluntary*, and equivalent to a relinquishment of the personal privilege of objecting to the jurisdiction, and a consent to have the case proceed on its merits. Certainly nothing of that kind took place in this case. The respondent raised the question wherever it was possible, took the stipulations in the case above referred to, and evidently it was the plain understanding of all

parties, at all times, that the question was not waived. As to the effect of such stipulations, and of appearance in the case, see

Atkins vs. The Fib. D. Co., 7 Blatchford, 555, 558, 559, and the cases last cited.

The whole idea of issuing an attachment for the purpose of "*compelling an appearance*" of the defendant, whatever may be the power of, or practice in, courts having jurisdiction of the causes in which such appearance is sought to be compelled —the whole idea that such means may be taken to compel an appearance in a Federal Court, where the jurisdiction of the causes is limited by the situation of the parties, is without foundation. There is no more reason why the court should have power to compel an appearance in an admiralty case, than in one at common law, and, before the new Practice Act of June 1, 1872, making the practice of State courts applicable to the Federal courts, (an act of course in no sense affecting the question in this case, which was commenced in 1869, and is limited in its application in these respects to common law cases,) no one would undertake to claim that an attachment could have been issued out of a Federal Court in Ohio against a Michigan corporation, in a common law action, to compel an appearance, or otherwise. In an action *in rem*, a District Court, upon seizing the thing, takes jurisdiction of course, wherever or by whomsoever it may be owned. But that is altogether a different matter. A ship is considered, in actions *in rem*,

almost a vital being, informed by the persons engaged in her navigation or control, and capable of acting through their agency.

Benedict's Ad., §§ 364, 438.

No appearance, in an action *in rem*, is necessary to give jurisdiction. An action *in personam* is in every sense another thing. No one, in any such sense as a ship is represented, represents property attached. The non-resident owner may be in Calcutta. The property attached may be stock in a corporation. The whole theory of the limitation of the judiciary act is, that in "*civil* cases," parties shall not be held to answer in any other District than that of which they are "inhabitants," or in which they are "found." The very idea of *compelling appearance*, and thus giving jurisdiction, through distress of a man's property—the whole idea of thus *compelling his submission to the jurisdiction of a court*—is utterly repugnant to the principle of the limitation of the judiciary act.

Again, if it were possible, thus to distress a party into subjection to a jurisdiction, certainly, by act of Congress, or by rule of this court, some practice would have been prescribed, by which notice should be given of such a proceeding against a party, resident and at the time, being, in Japan, for instance. No such practice existed when this action was commenced, or exists now in admiralty or equity cases, whatever may be the consequences in common law cases, of the wholesale adoption of the rules of State practice, by the act of June 1, 1872.

If process, which shall, through distress of goods, compel appearance in an admiralty case, be a proper proceeding, why would it not be equally admirable to employ the same force, the same coercion, to *compel* appearance in an equity case? Even the act of June 1, 1872, does not give power to issue attachment in cases in equity (much less in admiralty causes), but only provides in its 13th section for an order directing appearance, etc., in cases where there is "a legal or equitable lien or claim against real or personal property within the District;" and that in case the defendant does not appear, the adjudication made shall only affect property in the District; and, it is submitted, that even the 6th section of the act, in relation to common law actions, only gives the Courts power to issue attachments in cases over which they have jurisdiction, thereby placing common law actions in this respect upon the same footing as admiralty causes *in personam*, giving power to issue attachments in cases of absconding or concealed debtors (as in *Manro vs. Almeida*) for instance, and not giving power to issue process in any action where the defendant is not an inhabitant of the District, or found therein.

The positive limitations of the judiciary act, which says the action shall not be "*brought*," etc., it is claimed, cannot be repealed by language (which can have the important effect of giving the Court power to act the same, in this respect, in common law actions and admiralty causes *in personam*, and thus making the law harmonious), so general as that of the 6th section of the act of June 1, 1872. Again, however commendable an attachment may

be in an admiralty case by way of *distress*, to compel submission to a jurisdiction, supposing the fortitude of a party who had read the 11th section of the judiciary act, should enable him to withstand the power and process of the Court, and *he would not appear, how would jurisdiction be obtained in the action in direct opposition to the judiciary act, over a party not an inhabitant of the District, and not found within it; how would jurisdiction be obtained to make the attachment effectual, and how would decree be rendered in the cause?* Would the Court proceed to the outlawry of the defendant? Certainly it could render no judgment or decree in an action over which it had no jurisdiction, and which an act of Congress had expressly provided should not be "brought."

In *Boyd vs. Urquhart*, 1 *Sprague*, 423, it was held that in such a case remedy might be had against the property attached. It is submitted that the decision is substantially based only on *Manro vs. Almeida* and *Clarke vs. The N. J. S. N. Co.* (hereinafter considered); that it is an anomaly in jurisprudence, that in a personal action, remedy should be had against the property of a party against whom judgment or decree could not be rendered; and that to sanction such practice would be to change personal actions, into actions *in rem.*

4. But to consider the precise authorities bearing on the exact question. The first case in which the precise question, whether in an action against a foreign corporation, in admiralty, an attachment might properly issue, seemed to come up, was

Clarke vs. The N. J. S. N. Co., 1 *Story*, 531.

A careful examination of that case will, however, at once show that the point was not up, or considered, or decided in the case. The only question raised or determined in that case was, that *assuming that process of attachment might issue upon a libel in personam against private persons who could not be found and were not residents of the District* (which is not the law, as has been and will be shown), similar process might issue against corporations. This may be so; and would be so, were it not a *legal impossibility* to find a corporation foreign to the District, within it. In the case in 1 *Story*, the ground here taken, that the 11th section of the judiciary act applies to such cases, was not even alluded to. The consideration of the whole case was based on a misconception of the case of *Manro vs. Almeida*, 10 *Wheat.*, 473. That was a libel filed *in personam* for a maritime tort against a defendant who, the libel alleged, had "absconded from "the United States and fled beyond the jurisdic-"tion of the Court." The decision of this case determines (what the respondent here does not question) that the process of attachment may issue out of an Admiralty Court, in such a case, if the Court had jurisdiction of the case itself. It would have had jurisdiction in the case of *Manro vs. Almeida*, under the very terms of 11th section of the judiciary act, if the defendant was an "inhabitant" of the District, although he could not be found. It does not appear in that case but that Almeida was an inhabitant of the District, and therefore that the Court had jurisdiction. In fact, it may perhaps be said that he was such "inhabitant," for the Marshal returns to the writ (10 *Wheaton*, 474), that he

"left a copy of the monition at the late *dwelling-*
"*house of Almeida.*" Again in this case, as in 1 *Story*, the point of the application of the 11th section of the judiciary act was not made or referred to.

The case in 1 *Story*, as has been said, is based on a misconception of *Manro vs. Almeida*. "It has "not been doubted," say the Court in 1 *Story*, "that "the process of attachment well lies in an admi- "ralty suit against the property of private persons "who may not be found in the District. Ever "since the elaborate examination of the whole sub- "ject in *Manro vs. Almeida*, the question has been "at rest;" and the case proceeds to determine simply that the principles of *Manro vs. Almeida* apply as well to corporations as private persons. Perhaps this is so. But neither case considers, meets, or determines whether a District Court has jurisdiction of an admiralty suit *in personam* against a person who *is not an inhabitant of the District, and cannot be found therein*, when the judiciary act governing the case, and the source of all the power the Court possesses, provides that the Court shall *not* have jurisdiction of any civil action (which such a suit *in personam* has been shown to be) against a person who is not such an inhabitant, and cannot thus be found. Had the facts permitted that question to be put to the Court in either case, and had it been thus put to the Court, could it have avoided deciding that the Court in which the action was sought to be commenced, had no jurisdiction? Could it have decided that it had jurisdiction through some indefinable, peculiar, and anomalous power, supposed to be possessed by a Court of Admiralty, and which could only be exercised in

direct opposition substantially to an act of Congress? The cases in 1 *Story and* 10 *Wheaton*, are, therefore, no authorities on the point. They are the sources, however, from which have arisen the decisions of a few of the District Courts, in which, without complete examination, they have held, substantially, that they had power to issue process in causes in which they had no jurisdiction.

And it is always to be remembered, that it is not contended in this case, that an attachment cannot issue in a case against a party who is an "inhabitant" of the District, and who has absconded, or is concealed. In that case the Court would have jurisdiction of the action from the fact that the defendant was an "inhabitant" of the District, although not "found therein." In such a case there would be no impropriety in *compelling* the appearance of the absconding or concealed defendant; and, it is claimed, that the whole idea of compelling an appearance, only has proper relation to such a case.

Smith vs. Miln, 1 *Abbot, Ad. R.*, 373, 382, *and authorities cited.*

It is repeated, it is not contended that an attachment cannot issue in an action *in personam*, in admiralty, in a case of which the Court has jurisdiction; but it is contended that an attachment cannot issue in an action of which the Court has no jurisdiction. In the failure to discriminate between the two cases, and in misapprehension of the cases in 1 *Story* and 10 *Wheaton*, the error of some of the District Courts which have held that an attachment may issue against a party not an

inhabitant of the District and not found therein, has arisen. Upon examination it will be seen that the conclusions reached in those cases, have been so reached without consideration of all the matters which should have been considered in reaching such conclusion. Others of the District Courts have held in accordance with the view here contended for.

5. It has been shown that such a suit *in personam*, in admiralty, is a "civil suit." Equally, therefore, with other civil cases must this case be within the operation of the eleventh section of the judiciary act. All other civil cases are within the operations and prohibitions of that section, and, therefore, this must be.

Hollingsworth vs. Adams, 2 *Dallas*, 396.
Picquet vs. Swan, 5 *Mason*, 35.
Richmond vs. Dayfrous, 1 *Sumner*, 131.
Sayles vs. The N. W. Ins. Co., 2 *Curtis*, 211.
Toland vs. Sprague, 12 *Peters*, 300, 327, 328.

In each and all these cases, (as well as in the cases hereinafter cited,) it is as distinctly held as ever a legal point can be, that no civil suit in a Circuit or District Court can be brought against a person, unless he be an inhabitant of that district, or found therein. This is the language of this court in the latter case: "The right to attach "property, to compel the appearance of persons, "can properly be used only in cases in which such "persons are amenable to the process of the courts, "*in personam*; that is, where they are inhabitants,

"or found within the United States; * * *
"and we add, that even in case of a person being
"amenable to process *in personam*, an attachment
"against his property cannot be issued, except as
"part of, or together with, the process to be served
"on his person."

6. Nor can it be claimed that the District Court should have power to issue an attachment, because it being an admiralty cause, the District Court has exclusive original jurisdiction of such suits. There is nothing to prevent the exercise of that jurisdiction in the district where the defendant can be found. In other cases where the Federal Courts have exclusive jurisdiction, civil actions cannot be maintained against defendants, except in districts where they are inhabitants, or can be found.

a. The Federal Courts have exclusive jurisdiction of patent cases.

Dudley vs. Mayhew, 3 *Comstock*, 9.
Allen vs. Blunt, 1 *Blatchford, C. C. R.*, 480.

b. In such cases, it is expressly decided the courts cannot obtain jurisdiction, or issue attachments, unless the defendants are inhabitants of, or can be found in the district.

Day vs. N. J. R. R. M. Co., 1 *Blatchford*, 628.

In this case the court say: "It must be regarded
"as settled, that in order to give jurisdiction to the
"Circuit Court of the United States, the party de-

"fendant must be an inhabitant of the district in "which the suit is brought, or he must be found "within it at the time of the service of the original "process, and this whether the suit be commenced "by writ, summons or attachment, or whatever may "be the nature or character of the process used. "No exception is found in the act of Congress, "providing for the commencement of suits in these "courts, nor in the judicial exposition given it." The court further decides that a foreign corporation is not an inhabitant of the district and cannot be found therein, although its president is served with process in the State. (*See pp.* 632, 633, 634.)

Sadler vs. Hudson, 2 *Curtis*, 6.
Chaffee vs. Hayward, 20 *How.*, 208, 216.

In this case the precise question was up, and the court say: "Jurisdiction of a person can only be "obtained in a civil action by service of process "on his person within the district where the suit is "instituted, and no jurisdiction can be acquired "by attaching property of a non-resident defend-"ant." The court go on to determine that this is equally the rule where the case is one exclusively within the jurisdiction of the Federal Courts, and that the eleventh section of the judiciary act is unaffected by any process act, and "applies, in its "terms, to *all* [the italics are those of the court] "civil suits; it makes no exceptions, nor can the "court make any." Where suits are to be brought, is provided by the "eleventh section of the ju-"diciary act, which requires personal service of "process within the district where the suit is

"brought, if the defendant be an inhabitant of "another State."

7. Nor can any State law extend the jurisdiction of the court,

Toland vs. Sprague, 12 *Peters*, 300.
Day vs. N. J. R. R. M. Co., 1 *Blatchford*, 628.
Roach vs. Latham, 22 *How.*, 129, 130,

or in any way affect admiralty remedies.

The Globe, 2 *Blatchford*, 428.
Marvin on Wreck, etc., 44, *and cases cited.*

8. These cases are all civil cases; and some of the leading ones, cases over which the Federal Courts had exclusive jurisdiction. What can oppose the conclusion based upon their authority? Certainly not the cases in 1 *Story* and 10 *Wheat.*, where the question was not even raised.

9. It would seem that the admiralty rules of the Supreme Court were drawn under the views here taken. The second rule only permits an attachment to issue with process for arrest, (which contemplates the actual finding of the defendant within the jurisdiction,) and the twenty-third rule requires that a libel *in personam* shall state the residence of the parties. Why is this, unless it be that the court may see that the defendant is an inhabitant of the district, etc., and thus know that jurisdiction can be obtained?

Rules 2d and 23d, Sup. Court in Ad.

10. The precise point in the case, however, was raised and decided in an admiralty case in

Ex parte Graham, 3 *Wash. C. C. R.*, 456, 462.

This was a prize proceeding in admiralty against Graham, in which it was alleged that he had carried away certain condemned property. Graham neglected to appear pursuant to monition in the case, and process in the nature of an attachment was issued, alleging contempt in not obeying the monition. Graham was arrested in another district. A writ of *habeas corpus* was issued upon his petition, and the precise question arose whether or not the eleventh section of the judiciary act applied to the case. The court say: "Prize proceeding against an inhabitant of the United States is unquestionably a civil suit, and if it be against the person instead of the thing, the jurisdiction is excluded, unless it be instituted in the court of the district whereof he is an inhabitant, or is found at the time of serving the process."

Wilson vs. Pierce, 5 *Monthly Law Reporter* (*N. S.*), 137.

In this case the precise question again came up. The court, in this case fully and particularly reviewed the case in 1 *Story* and *Manro vs. Almeida*. It also considered the scope and policy of the limitations of the judiciary act. This case, too, was decided before the very important decisions, involving the same principle and deciding the same

question, 1 *Blatchford, C. C. R.*, 2 *Curtis*, and 20 *Howard.* It is expressly approved in the last edition of Conkling's Admiralty.

Conkling's Admiralty (2d. *Ed.*), 159.
Blair vs. Bemis, Shipman, J., Ms.
Steele vs. The L. N. Co., McLean, J., Ms.

The exact question received able consideration in

Atkins vs. The Fibre Disin. Co., 7 *Blatchford*, 555,

reversing the decision of the District Court upon the same point reported in 1 *Benedict's R.*, 118,*

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*NOTE.—The decision of the case of *Atkins vs. The Fibre D. Co.*, in the District Court, certainly requires particular consideration as to the reasons upon which it is based.

1. The court says that the case of *N. J. S. N. Co. vs. The Merchants' Bank*, 6 *Howard*, 344, presented the question. In that case the respondent put in a general appearance, and filed an answer without any stipulation that such appearance, etc., should not affect the question of jurisdiction (see p. 352 of the report), and the question could not possibly have arisen. (*Ante, Point Second*, 2.)

2. The language of Prof. *Parsons* is quoted as sustaining the jurisdiction. Except so far as the language referred to, is based upon *Manro vs. Almeida; Clarke vs. The W. J. S. Co.*, and *The N. J. S. N. Co. vs. The Merchants' Bank*, which have been considered, and one or two other cases where the point was not considered, or did not arise, it is founded upon a misconception of the statute referred to.

2 *Parsons on Mar. L.*, 686.
2 *Parsons on Sh.*, 393.

A careful reading of the sections referred to by Prof. Parsons, will at once make clear that the criticism made by him, is founded in mistake; and that the limitations upon the jurisdiction of the court, is not confined to the subjects embraced in the first part of the eleventh section of the judiciary act, viz., "suits of a civil nature at "common law or in equity." That phrase is only used in the section referred to, in respect to *causes in the Circuit Courts.* The portion of the section in question relates to "*civil suits*" *in both Circuit and District Courts.* No civil suit in a District Court is spoken of in the parts of the section referred to by Prof. Parsons. The language, therefore, of necessity refers to that part of the same act which gives the District Court jurisdiction of civil causes, and that part is the one giving that court jurisdiction of admiralty causes. (*Sec.* 9 *Judiciary Act.*) Beyond all question,

and it is there held by the learned Circuit Judge of the Second Circuit, after full consideration, that no jurisdiction over the cause exists in such a case, and that a court has no power to issue such process in a cause over which it has no jurisdiction.

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therefore, the language referred to so far as it relates to District Courts, must have no meaning, or it must apply to civil admiralty causes as well as other civil suits. What "civil suits" so far as the District Court is referred to, can be meant except the civil suits referred to in the act? No civil suit is referred to as being within the jurisdiction of the District Court except in that part of the act (*Sec.* 9) where jurisdiction is given to the District Court of "*civil* causes of admir- "alty jurisdiction." It could be as well maintained that the provision referred to, does not apply to other civil cases and only applies to admiralty cases, as the contrary. The statute makes no distinction. A careful examination of the section and the act, will show that Prof. Parsons' suggestions only strengthen the conviction that the District Court had no jurisdiction in this case.

3. The process act of 1789, passed five days after the judiciary act, was but a temporary act, afterwards [redacted] superseded.

Ante, Point First, Note 1.
1 *Brightly's Dig.*, 793.

4. The first section of the act of February, 28, 1839 (5 *Stat. at L.*, 321), it is submitted could not have been intended to apply to admiralty cases, nor can it be said that the same difficulties would arise in admiralty suits *in personam*, as in the cases to which the section is made to apply, and which the section was intended to remedy. It is hard to conceive of a defendant in an action *in personam* in admiralty, who, if any remedy were sought against him, would not be a necessary and indispensable party to the suit. The first section of the act of February 28 1839, was not intended to apply to necessary and indispensable parties. The point is most conclusively settled by this court, upon principles of natural justice.

Shields vs. Barrows, 17 *Howard*, 139, 141, 142.
Cairon vs. Millauden, 19 *Howard*, 113, 115.
Russell vs. Clarke's. Exrs., 7 *Cranch*, 69.

5. It is submitted, that nothing can be argued from the act of May 4, 1858 (11 *Stat. at L.*, 272), to sustain the jurisdiction. That act was never intended to apply to a suit *in rem*. A ship is not a *defendant* within the meaning of that act, and it is submitted that a master of a vessel is never a *necessary* party in any case the court refers to, although the rule in admiralty permits him to be joined as respondent in a suit *in rem*. The analogy sought to be drawn by the court is imperfect.

6. Are any of the cases as to which *Rule* 22, and *The S. C. Ives, Newberry's R.* 214, are cited, strictly actions "*in personam?*" It is submitted that they are not.

See case last cited, and
Rule 20, *Sup. Court in Ad.*
Benedict's Ad., §395.
2 *Conkling's Ad.*, 528.
2 *Parsons on Sh.*, 343.

11. The policy and reason of the 11th section of the judiciary act require such construction as that here contended for.

a. That policy is that defendants may not be compelled to answer in other Districts than those in which they are inhabitants or are found.

Toland vs. Sprague, 12 *Peters*, 300, 328.
Exparte Graham, 3 *Wash. C. C. R.*, 462.
Atkins vs. The F. D. Co., 7 *Blatchford*, 555.

And it is to be remarked, in this connection, that the phrase in the constitution that the judicial power of the United States shall extend to "all "cases of admiralty and maritime jurisdiction," and that in the judiciary act, which provides that the District Courts shall have "exclusive original cog- "nizance of all civil causes of admiralty jurisdic- "tion," do not together or separately mean that each District Court can take jurisdiction of every admiralty case. They mean as they say, that the judicial power shall extend to all such cases, and some one of the District Courts can take cognizance of any admiralty case. If the phrases bore any other construction, the absurd consequences would legitimately follow that a District Court in

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7. The rules of this court referred to by the learned District Judge, cannot extend the *jurisdiction* of the courts.

Ante, Point First, III., 1, *b.*
Chaffee vs. Hayward, 20 *How.*, 208, 215.
Toland vs. Sprague, 12 *Peters*, 300, 327, 328.

and it is to be remembered that this is a question of jurisdiction over the cause, and not as to the form or effect of process, etc.

The reasoning of the District Court in *Atkins vs. The Fibre Dis. Co.*, is thus particularly referred to, for the reason that the opinion states all points urged to sustain the jurisdiction.

California might take jurisdiction of a case *in personam* against a defendant in Maine, or of a case *in rem* against property upon the Western Lakes, for if each District Court must of constitutional necessity take cognizance of every admiralty case, it must be held that its process can run out of its own District, for that is but a necessary means of exercising a jurisdiction it cannot refuse to exercise.

Exparte Graham, 3 *Wash. C. C. R.*, 460.

b. The reason for denial of the power to issue the attachment is that no jurisdiction can be had of the action unless jurisdiction can be obtained of the person or party.

Levy vs. Fitzhugh, 15 *Peters*, 171.
Sadler vs. Hudson, 2 *Curtis*, 6.

And for the further reason that the question is as to the person, and it can make no difference in that respect whether property may be within the jurisdiction of the Court. The Court cannot cause process to be served on the defendant, or render judgment against him *in personam*, any more in one case than in the other.

Toland vs. Sprague, 12 *Peters*, 300, 328.

And also for the still further reason that no provision is made for giving notice in such cases of the arrest of the property upon attachment, or any service of the monition in the cause.

Wilson vs. Pierce, 5 *M. Law Rep.*, 137.

POINT THIRD.

Upon the language of the acts and rules relating to the subject, understood in their exactness of phrase, and in their application to the matter as a part of the remedial law of the country; upon the principles and objects of these acts and rules; upon the analogies of cases at common law and in equity; upon express authority and upon authority bearing on the question; and upon grounds of private justice and public policy, it is apparent that the District Court of the United States for the Northern District of Ohio had no jurisdiction of this cause, and no power to issue the attachment issued by that court, with reference to *compelling* an appearance in the cause, and thereby a submission to a jurisdiction not given by law, or for any other object; and had no power, as no court has power, to issue process in a cause over which it has no jurisdiction.

GEORGE B. HIBBARD,
For Respondent,
Buffalo, N. Y.